Docket for 04-514

(10)

No. 04-514 *** CAPITAL CASE ***
Title: Ricky Bell, Warden, Petitioner
v.
Gregory Thompson
Docketed: October 18, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (00-5516)
Decision Date: June 23, 2004
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 10 2004	Application (04A211) to extend the time to file a petition for a writ of certiorari from September 21, 2004 to October 14, 2004, submitted to Justice Stevens.
Sep 17 2004	Application (04A211) granted by Justice Stevens extending the time to file until October 14, 2004.
Oct 14 2004	Petition for a writ of certiorari filed. (Response due November 17, 2004)
Oct 14 2004	Appendix of Ricky Bell, Warden filed.
Nov 16 2004	Brief of respondent Gregory Thompson in opposition filed.
Nov 16 2004	Motion for leave to proceed in forma pauperis filed by respondent Gregory Thompson.
Nov 30 2004	Reply of petitioner Ricky Bell, Warden filed. (Distributed)
Dec 1 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 7 2005	Petition GRANTED limited to Question two presented by the petition.
Feb 8 2005	Consent to the filing of amicus briefs in support of either party or neither party for received from counsel for the respondent
Feb 22 2005	SET FOR ARGUMENT ON Tuesday, April 26, 2005.
Feb 22 2005	Brief of petitioner Ricky Bell, Warden filed.
Feb 22 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Feb 22 2005	Joint appendix filed.
Mar 9 2005	Record received from U.S.C.A. 6th Circuit. (1 binder)
Mar 11 2005	Record for U.S.D.C. Eastern District of Tennesee received from U.S.C.A. 6th Circuit. (5 boxes)
Mar 22 2005	Motion of Matthew M. Shors to argue pro hac vice.
Mar 25 2005	CIRCULATED.
Mar 29 2005	Brief of respondent Gregory Thompson filed. (Distributed).
Mar 29 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Apr 4 2005	Motion to argue pro hac vice filed by respondent GRANTED.
Apr 19 2005	Reply of petitioner Ricky Bell, Warden filed. (Distributed)

Supreme Court
FILED

No. 04-~~04~~ 514

OCT 14 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 201

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CAPITAL CASE
QUESTIONS PRESENTED

I.

By withholding issuance of its mandate affirming the denial of habeas corpus relief for more than six months beyond the time for mandatory issuance under Fed. R. App. P. 41(d)(2)(D) and then by issuing a new opinion and judgment remanding the case to the district court for further proceedings in light of materials contained in a post-judgment motion filed by the respondent under Fed. R. Civ. P. 60(b), did the Sixth Circuit violate the terms of 28 U.S.C. §2244(b)?

II.

Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Fed. R. App. P. 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

III.

By remanding the case for a "full evidentiary hearing" on respondent's initial habeas corpus petition without any determination that the conditions prescribed in 28 U.S.C. §2254(e)(2) were met, did the Sixth Circuit violate the terms of AEDPA and this Court's decision in *Williams v. Taylor,* 529 U.S. 420 (2000)?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit withdrawing its opinion filed January 9, 2003, and remanding this capital federal habeas corpus case to the United States District Court for the Eastern District of Tennessee for further proceedings.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1) that is the subject of this petition is published at 373 F.3d 688. The earlier opinion of the court of appeals affirming the district court's denial of habeas corpus relief (App. 117) is reported at 315 F.3d 566. The memorandum opinion of the district court dismissing Thompson's petition for writ of habeas corpus (App. 202) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on June 23, 2004.[1] (App. 1) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[1] On September 17, 2004, Justice Stevens granted petitioner's application to extend the time to file a petition for writ of certiorari from September 21, 2004, until October 14, 2004. *Bell v. Thompson*, No. 04A211.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Rule 41(d)(2), Federal Rules of Appellate Procedure, provides in pertinent part:

> (A) A party may move to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause.
>
> * * *
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

STATEMENT OF THE CASE

I. Procedural History

Respondent Gregory Thompson ("respondent" or "Thompson") was convicted in 1985 by a jury in Coffee County, Tennessee, for the first degree murder of Brenda Blanton Lane on New Year's Day of that same year. At a separate sentencing hearing, the jury sentenced Thompson to death after finding three aggravating circumstances

beyond a reasonable doubt: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (2) that the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution; and (3) that the murder was committed while the defendant was engaged in committing robbery or kidnapping. Tenn. Code Ann. §39-2-203(i)(5), (6), (7) (1982) (repealed). The Tennessee Supreme Court affirmed the judgment, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and this Court denied certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990).

In October 1990, Thompson filed a petition for post-conviction relief in state court, contending, *inter alia*, that trial counsel was ineffective for failing fully to investigate and present evidence showing that he had suffered certain head injuries that might have contributed to his commission of the offense. The post-conviction court rejected Thompson's claim following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed the denial of the petition for post-conviction relief. *Thompson v. State,* 958 S.W.2d 156 (Tenn. Crim. App. 1997). Thompson subsequently sought permission to appeal to the Tennessee Supreme Court pursuant to Rule 11, Tennessee Rules of Appellate Procedure, but that court denied his application on October 20, 1997.

On June 12, 1998, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. On February 17, 2000, the district court entered an order summarily denying Thompson's claims for relief and dismissing his petition. (App. 202) Thompson appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit.

On March 1, 2001, while Thompson's appeal was pending in the Sixth Circuit, but before oral argument, Thompson filed a motion in the district court under Rule 60(b), Federal Rules of Civil Procedure, requesting the district court to "supplement" the record with additional evidence that had been developed through discovery in the federal habeas proceeding but had never been presented to the district court and, in light of that evidence, to "revisit [the court's] previous summary denial" of Thompson's habeas petition. (App. 337, 341)

Contemporaneous with the filing of his Rule 60(b) motion, Thompson filed a motion in the Sixth Circuit seeking to hold his appeal in abeyance pending the district court's disposition of the Rule 60(b) motion. (App. 333) The district court denied Thompson's Rule 60(b) motion on March 7, 2001 (App. 343), and the Sixth Circuit denied Thompson's motion to hold his appeal in abeyance on March 21, 2001. (App. 345)

On January 9, 2003, in a two-to-one decision, a panel of the Sixth Circuit affirmed the district court's denial of habeas relief. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003). (App. 117) Thompson filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Sixth Circuit. The panel reviewed the petition and, after finding that the issues raised were fully considered upon the original submission and decision of the case, denied rehearing on March 10, 2003. (App. 346) On March 24, 2003, the court of appeals stayed the issuance of its mandate pending the filing and disposition of a petition for writ of certiorari. (App. 347)

On August 6, 2003, Thompson filed a petition for writ of certiorari in this Court. The Court denied Thompson's

petition on December 1, 2003. *Thompson v. Bell*, 124 S.Ct. 804 (2003). The following day, December 2, 2003, Thompson filed a motion in the court of appeals to extend the stay of the mandate pending a petition for rehearing in this Court from the denial of his certiorari petition. This Court's order denying certiorari was filed with the clerk of the court of appeals on December 8, 2003. The Sixth Circuit granted Thompson's motion to extend the stay of the mandate on December 12, 2003, pending the filing of a petition for rehearing and "thereafter until the Supreme Court disposes of the case." (App. 348) Thompson filed a petition for rehearing in this Court on December 22, 2003. On January 20, 2004, the Court denied Thompson's petition for rehearing. *Thompson v. Bell*, 124 S.Ct. 1162 (2004). A copy of the Court's order denying rehearing was filed with the clerk of the court of appeals on January 23, 2004.

On February 25, 2004, the Tennessee Supreme Court ordered that Thompson's death sentence be carried out on August 19, 2004. In addition, finding that Thompson had sufficiently raised the issue of his present competency to be executed through his Notice of Incompetency to be Executed and supporting exhibits, the state supreme court remanded the case to the trial court where Thompson was originally convicted and sentenced for an "expeditious determination" of his present competency. (App. 349)

On March 1, 2004, Thompson filed a "Petition Providing Notice of Incompetency to Be Executed, Requesting a Hearing on Competency to Be Executed, and Requesting an Order Finding Gregory Thompson Incompetent to Be Executed and Issuance of a Reprieve" in the state trial court. Accompanying his petition were, *inter alia*, three mental health experts' reports, all dated after this Court's

denial of certiorari, opining concerning Thompson's present competence. On March 8, 2004, the trial court denied Thompson's competency petition without a hearing, and, following expedited review, the Tennessee Supreme Court affirmed the judgment of the trial court in an opinion filed on May 12, 2004. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). (App. 352)

On June 14, 2004, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, asserting a claim of incompetency for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). On June 21, 2004, the district court granted a "brief stay" of Thompson's execution, with the stay to expire automatically upon issuance of an order of the court denying habeas relief but to remain in place upon issuance of an order granting the writ. The district court further ordered that the Warden file a response to Thompson's *Ford* petition within 10 days of the date of the order.

On June 23, 2004, the Sixth Circuit issued an opinion in which it vacated the district court's February 2000 order dismissing Thompson's initial habeas petition, supplemented the record on appeal with a deposition that had been attached to Thompson's March 2001 motion to hold his appeal in abeyance but never presented in the habeas proceedings in the district court, and remanded the case to the district court for a "full evidentiary hearing" on Thompson's initial habeas petition. (App. 5-6)

II. Facts Relevant to the Petition

1. The proof at Thompson's criminal trial and sentencing is summarized in the Tennessee Supreme Court's

decision on direct appeal. *State v. Thompson*, 768 S.W.2d 239, 243-44 (Tenn. 1989).

On December 29, 1984, Gregory Thompson and Joanne McNamara, a juvenile female, traveled by bus from Marietta, Georgia, to Shelbyville, in Bedford County, Tennessee. They presented themselves as a married couple at the home of Willa Mae Odum, an acquaintance of McNamara's family, who allowed them to stay there. When Ms. Odum learned the two were not married, she asked Thompson to leave, but he remained through the night of December 31, waiting for a relative to wire him some money. The following morning, January 1, 1985, Odum again insisted that Thompson leave, and she called the authorities to report McNamara as a runaway. This call apparently prompted the couple to depart Odum's home. Having little money and no transportation, the couple spent the afternoon at a nearby Wal-Mart store.

That same afternoon, January 1, after making several purchases at the Wal-Mart, Brenda Lane did not arrive home when expected. Shortly after midnight, Lane's automobile was reported on fire near an apartment building in Marietta, Georgia. Thompson and McNamara were arrested on the night of January 2 in connection with the investigation of Lane's disappearance. A traffic ticket in Thompson's jacket showed that he had been cited for speeding while driving Brenda Lane's vehicle on Interstate 24 in Tennessee near the Georgia line. A Wal-Mart receipt and several items recovered from the vehicle indicated a purchase at the Shelbyville Wal-Mart at 5:51 p.m. on January 1. A button found in Lane's car matched those on Thompson's clothing.

A few hours after being taken into custody, Thompson admitted that he had abducted a woman at knifepoint from the Wal-Mart in Shelbyville and forced her to drive him and his companion in her car to a remote location outside Manchester, Tennessee. There, according to Thompson, he stabbed her, drove the car over her body and left. Thompson drew a map illustrating the route from the town to the site of the stabbing and spoke with authorities by telephone to clarify certain aspects of his directions.

On January 3, 1985, following Thompson's directions, a search team found Brenda Lane's body at the location indicated in Thompson's statement. She died from multiple stab wounds to the back and, according to the pathologist, would have remained conscious five to ten minutes before bleeding to death. Apart from the stab wounds, there was no evidence of other injury or trauma to Lane's body. Thompson presented no proof in the guilt phase of trial, and the jury convicted him of the first degree murder of Brenda Lane.

During the sentencing phase, Thompson called a number of witnesses, including former high school teachers, acquaintances, his grandparents, two siblings and a cousin, who presented a picture of him as non-violent, cooperative and responsible. Witnesses described in detail his childhood and family circumstances in Georgia until he left in 1979 to join the Navy. The Tennessee Supreme Court noted in its opinion on direct appeal that, "while [Thompson's] family was poor, it was also good and loving." *Thompson*, 768 S.W.2d at 244.

Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, testified that she knew

Thompson from December 1980 until June 1984. She described their relationship as good, one that she was "very proud to have experienced," and stated that Thompson was caring and sensitive. She related that Thompson had suffered a head injury when three of his fellow service members attacked him with a crowbar and that he became paranoid and unreasonably concerned about his and her personal safety thereafter. Cajulao was aware that Thompson was discharged from the Navy as a result of being court-martialed for shoving a petty officer and either dislocating the officer's shoulder or breaking his collar bone. She was also aware of other violent incidents involving Thompson and other Navy personnel. After leaving the Navy, Thompson returned to Georgia for a short time in 1983 and then in 1984 to look for work. Thompson's sister, Nora Jean Walton, and his brother-in-law testified about Thompson's activities in Georgia after he returned from the Navy, including his relationship with co-defendant Joanne McNamara.

Dr. George Copple, a clinical psychologist who interviewed and tested Thompson before trial, testified about his personality and aptitude for employment in prison. He opined that Thompson had an unusually strong need to nurture other people, which may have led, in part, to the commission of the offense in this case. Dr. Copple further testified that Thompson exhibited strong remorse for the killing and did not have adult anti-social personality.

To rebut Dr. Copple's testimony, the State presented the deposition of Dr. Robert Glenn Watson, a clinical psychologist who participated in a staff evaluation of Thompson at Middle Tennessee Mental Health Institute (M.T.M.H.I.) shortly after his arrest. Dr. Watson testified that Thompson showed little remorse and exhibited adult

anti-social behavior. He further stated that, during the pre-trial evaluation period, Thompson appeared to fake schizophrenia by claiming to hear voices and also falsely claimed that he was unable to read. *Thompson*, 768 S.W.2d at 244.

2. In post-conviction proceedings, Thompson contended that his trial counsel was ineffective for failing to investigate the head injuries he had suffered prior to the murder. He claimed that evidence of the head injuries could have been beneficial to his case in the penalty phase of his trial. Following an evidentiary hearing, the state post-conviction court rejected Thompson's claim. The Tennessee Court of Criminal Appeals affirmed the decision of the post-conviction court, finding that counsel's decision to "emphasize [Thompson's] positive qualities [at sentencing] rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation." *Thompson*, 958 S.W.2d at 165. The court further found that Thompson had demonstrated no prejudice from counsel's alleged deficiencies, because he "failed to establish that the head injuries had any effect upon his mental stability at the time of the murder" and "failed to demonstrate that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Id.*

III. The Opinions Below

1. The federal district court dismissed Thompson's petition for writ of habeas corpus without a hearing. As to his claim of ineffective assistance of counsel, the district court found in pertinent part that Thompson had presented no competent evidence in response to the State's

motion for summary judgment, by way of affidavit, deposition or otherwise, demonstrating that he was suffering from a significant mental disease at the time of the offense or at trial that should have been presented to the jury during the penalty phase of his trial as mitigation evidence. (App. 270) The district court further noted that Thompson "had two different psychological evaluations [prior to trial] and both resulted in findings of competency at the time of the crime and at the time of trial." In addition, the district court found that the state-court record supported the state post-conviction court's determination that trial counsel reasonably investigated Thompson's background and mental health history. (App. 270-71)

2. In an opinion filed January 9, 2003, the Sixth Circuit affirmed the judgment of the district court. With regard to Thompson's ineffective assistance claim, the court observed that, because the Tennessee courts stated the appropriate standard established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the question to be decided was whether the state court unreasonably applied *Strickland* to the facts of Thompson's case under 28 U.S.C. §2254(d). (App. 154) The court of appeals found that the state-court record reflected that counsel adequately investigated Thompson's mental health:

> [T]he [state court] record reflects that trial counsel investigated Thompson's mental health and that he received expert assistance to attempt to establish valid mitigating factors. The record shows that trial counsel were aware from the outset of Thompson's prior head injuries and inappropriate behavior, and that they investigated possible mental illness or defect. They requested a competency evaluation. Thompson was evaluated for thirty days by a team of experts. The

MTMHI team found no mental illness, mental defect, or insanity. Counsel also had [Dr. George] Copple, a clinical psychologist and former professor of psychology at Vanderbilt, to evaluate Thompson. Copple found no evidence of mental illness.

* * *

[N]ot one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial. [Dr. Gillian] Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stated simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. Similarly, neither Crown or Sultan [Thompson's federal habeas experts] ever expressed an opinion that Thompson was mentally ill at the time of the crime.

* * *

As the Tennessee Court of Criminal Appeals held, there is no prejudice because, "[t]he petitioner has failed to establish that the head injuries had any effect upon [Thompson's] mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Thompson*, 958 S.W.2d at 165.

* * *

Indeed, although the state court ruled on the prejudice prong of *Strickland*, its ruling is

equally sustainable under the cause prong of *Strickland* because trial counsel's decision to employ a clinical psychologist at trial was not objectively unreasonable. Further, as the Tennessee Court of Criminal Appeals concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* Nor can there be prejudice because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime. Thus, the state court's decision holding that counsel were not ineffective under the Sixth Amendment is not an unreasonable application of *Strickland*.

(App. 158-59, 163-64)

3. Six and one-half months after this Court denied certiorari from that decision, the Sixth Circuit withdrew its January 2003 opinion and remanded the case to the district court for a "full evidentiary hearing." (App. 5-6) The court reasoned that a discovery deposition of a mental health expert taken by counsel during the federal habeas proceedings, but never submitted to the district court for consideration in connection with the warden's motion for summary judgment, was "extremely probative" in assessing Thompson's mental state at the time of the crime and, thus, relevant to his claim of ineffective assistance of counsel at sentencing. (App. 2) While acknowledging that the deposition was outside the record of the district court, the court of appeals nevertheless considered it in rendering its opinion pursuant to the court's "equitable power to supplement the record on appeal," finding that

the deposition was "apparently negligently omitted" by Thompson's habeas counsel.[2]

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to [the Warden] as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.

(App. 5-6) The court made no finding that Thompson was not at fault in failing to develop mental health evidence in state court or that the limitations set forth in 28 U.S.C. §2254(e)(2) were satisfied in order to justify its directive for a "full evidentiary hearing." Indeed, the court's previous opinion indicated to the contrary. (App. 169-70) As to its authority to reconsider its previous opinion, the court invoked its "inherent power to reconsider [its] opinion prior to the issuance of the mandate." (App. 6)

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[2] In his concurring/dissenting opinion, Judge Suhrheinreich found habeas counsel's explanation for the omission of the deposition to be "implausible, if not intentionally false," and thus justified the court's late intervention on grounds of a fraud upon the district court. (App. 82, 89-107) The panel majority, however, declined to join in that conclusion. (App. 2)

REASONS FOR GRANTING THE WRIT

In an opinion filed January 9, 2003, the Sixth Circuit affirmed the decision of the district court summarily dismissing Thompson's petition for writ of habeas corpus. After Thompson's petition for rehearing was denied by the Sixth Circuit in March 2003, this Court denied certiorari on December 1, 2003, and denied rehearing of that decision on January 20, 2004. Believing that Thompson's federal habeas case was once and for all final, the Tennessee Supreme Court set an execution date for August 19, 2004,[3] and ordered that the case be remanded to the trial court for an "expeditious determination" of Thompson's competence for execution under the procedures established in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).[4] (App. 349-51) The Tennessee Supreme Court thereafter affirmed the trial court's order denying a hearing on the issue of competence for execution when Thompson failed to make a sufficient threshold showing of present incompetence. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). (App. 352)

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[3] Tenn. Sup. Ct. R. 12.4(A) provides: "After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date. The motion shall include a brief summary of the procedural history of the case demonstrating that the prisoner has completed the standard three-tier appeals process. The motion shall be considered premature if filed prior to the expiration of the time for filing a petition for writ of certiorari or a petition to rehear the denial of a petition for writ of certiorari in the United States Supreme Court."

[4] In *Van Tran*, the Tennessee Supreme Court adopted the standard of competency for execution in Tennessee and established state-court procedures afforded state prisoners to assert last-minute claims of incompetence under *Ford v. Wainwright*, 477 U.S. 399 (1986).

But the State of Tennessee's reliance on the apparent finality of the federal judgment was misplaced because, behind the scenes, while the State was taking steps to carry out Thompson's lawful sentence, the Sixth Circuit was conducting a second review of Thompson's habeas corpus appeal. And, on June 23, 2004, 18 months after its initial decision denying habeas corpus relief and 198 days after this Court denied certiorari, the State's efforts to carry out its sentence were suddenly blocked when the Sixth Circuit withdrew its previous opinion, expanded the appellate record with material that had not previously been properly presented to *any* court, state or federal, and, based on that material, remanded the case to the district court for an evidentiary hearing on Thompson's original habeas petition.

The Sixth Circuit attributed its actions on all counts to its "inherent authority" as a federal appellate court. (App. 5-6) But while federal courts are undoubtedly vested with certain inherent authority over their proceedings and judgments, that authority may not be invoked to circumvent either federal statutes or federal rules. *Degen v. United States*, 517 U.S. 820, 823 (1996) (inherent powers of courts may be controlled or overridden by statute or rule); *Carlisle v. United States,* 517 U.S. 416, 426 (1996) (scope of "inherent power" does not include power to circumvent federal rules); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (same). The Sixth Circuit's action in this case did both. By inexplicably delaying issuance of the mandate following this Court's denial of certiorari (and rehearing of that denial) and the filing of that order with the circuit court clerk, the Sixth Circuit violated the unambiguous requirement of Fed. R. App. P. 41(d)(2)(D) that the mandate issue "immediately" upon

that event. By considering evidence presented in a "later filing" of a habeas petitioner in order to take new action on previously rejected habeas claims, the Sixth Circuit violated the requirement of 28 U.S.C. §2244(b)(1) that successive habeas applications "shall be dismissed." And by taking the extraordinary act of withdrawing its prior judgment and opinion without a finding, let alone any showing, that such action was necessary to prevent a "miscarriage of justice," the court committed a grave abuse of discretion. The court compounded its initial transgressions by directing that the district court conduct a "full evidentiary hearing" on respondent's habeas claims, without any finding that the conditions prescribed by 28 U.S.C. §2254(e)(2) were met.

Any one of these actions individually would warrant review by this Court because each frustrates the comity between the federal and state courts that Congress and this Court's habeas jurisprudence have sought to preserve. But in combination, the Sixth Circuit's action is nothing short of extreme judicial overreaching, wholly ignoring the jurisdictional limits imposed both by Congress through enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") and this Court and depriving the State of Tennessee of any assurance of "real finality" necessary to execute the State's judgment in Thompson's or any other capital case. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Intervention by this Court is thus warranted under Sup. Ct. R. 10(a) and (c).

I. THE SIXTH CIRCUIT'S DECISION TO WITHHOLD THE MANDATE FOLLOWING THIS COURT'S DENIAL OF CERTIORARI IS AN EXTRAORDINARY ACT EQUIVALENT TO A RECALL OF THE MANDATE.

The Sixth Circuit's sole stated source of authority for withdrawing its earlier opinion was its "inherent power to reconsider [the] opinion prior to issuance of the mandate." (App. 6) But a federal appellate court may not make an end run around the procedural limitations of AEDPA and the decisions of this Court by delaying issuance of the mandate in violation of the Rules of Appellate Procedure.

Following its initial disposition of Thompson's habeas appeal in January 2003, the Sixth Circuit denied rehearing and a suggestion for rehearing *en banc* on March 10, 2003, but stayed the issuance of the mandate pending a petition for writ of certiorari. (App. 346-47) When the Court denied Thompson's certiorari petition on December 1, 2003, *Thompson v. Bell*, 124 S.Ct. 804 (2003) (No. 03-5759), the Sixth Circuit entered an order extending the stay to allow Thompson to file a petition for rehearing from the denial of the writ of certiorari and "thereafter until the Supreme Court disposes of the case." (App. 348) On January 20, 2004, this Court denied Thompson's petition for rehearing; a copy of this Court's order denying rehearing was filed with the Clerk of the Sixth Circuit on January 23, 2004.

The unequivocal language of Rule 41(d)(2)(D), Federal Rules of Appellate Procedure, makes issuance of the mandate mandatory upon the denial of certiorari: "The court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (emphasis added) There is no

provision under any federal statute or the rules of appellate procedure authorizing a delay in the issuance of the mandate following the denial of certiorari. Rather, the issuance of the mandate upon receipt of an order of this Court denying certiorari is a ministerial act – one in which the actor has a statutory mandate to act in a certain manner without any discretion or power to adopt some other course of action[5] – and, in this case, that act should have occurred *immediately* upon the filing of this Court's order with the circuit court clerk on December 8, 2003. Any further stay of the mandate would have been justified only under the same exceptional circumstances permitting recall of the mandate. The Sixth Circuit, however, extended the stay pending the filing of a petition in this Court for rehearing of the denial of certiorari. Even assuming the court of appeals was justified in entering such an order, the extended stay expired by its own terms when this Court disposed of Thompson's petition for rehearing. (App. 348) For reasons never explained by the court of appeals, however, the mandate was never issued in this case. The Sixth Circuit entered no order further staying issuance of the mandate, let alone justifying a stay. The mandate simply did not issue.

Because Rule 41(d)(2)(D) allows no discretion in the issuance of the mandate, the filing of this Court's order denying certiorari with the Clerk of the Sixth Circuit operated, as a matter of law, to dissolve the Sixth Circuit's March 24, 2003, stay of the mandate. *See also* 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3987.1, p. 744 (3d ed. 1999) (If the Supreme

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[5] *Black's Law Dictionary* 899 (5th ed. 1979).

Court denies certiorari, "the stay is automatically dissolved and the rule directs that the court of appeals 'must issue the mandate immediately' when a copy of a Supreme Court order denying the petition for writ of certiorari is filed"). Therefore, a further stay of the mandate or any other action disturbing the finality of the court's prior decision following denial of certiorari is an extraordinary act tantamount to a decision by the court of appeals to recall the mandate. *See, e.g., Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir. 1992) (*en banc*) (continuing stay of mandate following denial of certiorari justified only upon the same exceptional circumstances permitting recall of the mandate); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (Rule 41(d)'s express direction makes threshold showing of "exceptional circumstances" necessary before mandate may be stayed after denial of certiorari). And in the federal habeas context, where a prisoner seeks relief from a criminal judgment entered by a state court, this Court has made clear that a decision to recall a mandate must be measured against the statutory and jurisprudential limits applicable in habeas cases. *Calderon*, 523 U.S. at 553. The June 2004 decision of the Sixth Circuit to withdraw its January 2003 opinion came 198 days after Rule 41(d)(2)(D) made issuance of the mandate mandatory and 152 days after the Sixth Circuit's "extension" of the stay expired and should, therefore, be deemed the equivalent of a decision by the Sixth Circuit to recall the mandate. Viewed in that light, the Sixth Circuit's action was patently illegal in several respects.

II. THE SIXTH CIRCUIT'S DECISION TO WITHDRAW ITS PRIOR OPINION AND PERMIT RESPONDENT TO RELITIGATE THE MERITS OF HIS UNDERLYING HABEAS CORPUS PETITION VIOLATES THE PROHIBITION AGAINST SUCCESSIVE APPLICATIONS UNDER 28 U.S.C. §2244(b) AND THIS COURT'S DECISION IN *CALDERON V. THOMPSON*.

A. The Sixth Circuit's decision violates 28 U.S.C. §2244(b).

On March 1, 2001, while his federal habeas appeal was pending in the Sixth Circuit, Thompson filed a post-judgment motion in the district court under Rule 60(b), Federal Rules of Civil Procedure, requesting that the district court permit him to "supplement" the record with the deposition of Dr. Faye Sultan, Ph.D., a psychological expert retained by Thompson in connection with his federal habeas proceeding and, in light of that testimony, "revisit its previous summary denial" of Thompson's habeas petition. (App. 337, 340-41) Although taken pursuant to a discovery order of the district court in federal habeas proceedings and obviously available to Thompson's counsel, the Sultan deposition had not been submitted to the district court during summary judgment proceedings or otherwise made part of the federal court record. In his Rule 60(b) motion, Thompson attributed his failure to submit the deposition in the district court to "mistake, inadvertence, surprise, or excusable neglect" on the part of Thompson's counsel. (App. 340)

Contemporaneous with the filing of his Rule 60(b) motion, Thompson submitted a motion to the Sixth Circuit seeking to hold his appeal in abeyance pending the district court's disposition of the Rule 60(b) motion. (App. 333) Attached to his abeyance motion were, *inter alia*, copies of

the Rule 60(b) motion and the Sultan deposition. The district court denied Thompson's Rule 60(b) motion on March 7, 2001 (App. 343), and the Sixth Circuit denied Thompson's motion to hold his appeal in abeyance on June 22, 2001. (App. 345) Three years later, however, the court of appeals withdrew its initial opinion based upon the very evidence at issue in Thompson's Rule 60(b)/abeyance motions, concluding that, "[b]ecause the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to [the Warden] as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal. . . ." (App. 5-6) The Sixth Circuit's decision unquestionably was based upon evidence presented in a "later filing" by a habeas petitioner. The court should thus be deemed to have acted on a successive petition subject to the requirements of 28 U.S.C. §2244(b).

Section 2244(b)(1) provides, in relevant part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. §2244(b)(1).

By its terms, §2244 applies only when the court acts pursuant to a prisoner's "application." Thus, whether a case is subject to §2244(b) depends upon the underlying basis of the court's action. When an appellate court recalls its mandate *sua sponte* solely on the basis of a first habeas petition, such action is not subject to the limitations of §2244, but is controlled instead by common law principles

applicable to habeas corpus proceedings generally. *Calderon,* 523 U.S. at 554. Recognizing AEDPA's strict limitations on successive applications, Judge Suhrheinreich expressed the view in his concurring/dissenting opinion that the court was acting "on [its] own motion" and was thus not obliged to satisfy the requirements of §2244. (App. 81) The majority opinion likewise stressed that the court's action was the result of Judge Suhrheinrich's *sua sponte* second review of the record. (App. 2) But where, in recalling a mandate, an appellate court considers new claims or evidence presented in a successive application for relief, the court's action should be regarded as based on that successive application, regardless whether the court characterizes its action as *sua sponte*. *Id*. And, unlike in *Calderon*, the court's incantation that it acted exclusively "on [its] own motion" is disproved by its consideration of matters presented in a "later filing" by Thompson. *Id*.

Indeed, the Sixth Circuit specifically based its decision to recall the mandate on evidence presented in connection with a post-judgment motion filed in the district court and which had come before the Sixth Circuit only by way of a companion abeyance motion filed in that court. The fact that Thompson styled his pleadings as a motion for relief from judgment under Rule 60(b) and/or motion to hold his appeal in abeyance is not controlling. Both filings were made with an eye toward relitigation of a prior claim, *i.e.*, one "that was presented in a prior application," in light of evidence not previously presented to the district court, a result plainly forbidden by §2244(b)(1). Thompson's post-judgment motions were thus the functional equivalent of a successive habeas application, which triggered the limitations of §2244(b)(1). *See Gonzalez v. Sec'y for the Dept of Corr.*, 366 F.3d 1253, 1275 (11th Cir. 2004) (*en banc*) ("If

the recall [of a mandate] is based on a motion by the petitioner, that motion is the functional equivalent of a second or successive petition and the terms of AEDPA's §2244(b) apply regardless of the label put on it"). And because the Sixth Circuit did precisely what *Calderon* says is forbidden – "consideration of [a] matter[] presented in a later filing," 523 U.S. at 544, namely, the Sultan deposition, in order to take new action on previously rejected claims – the court's decision directly contravenes both this Court's prior precedent as well as the letter of §2244(b).

AEDPA has placed the circuit courts in the role of "gatekeeper" to ensure that that no state inmate is permitted to litigate the same claim on the same facts and law in a successive petition in the district court. 28 U.S.C. §2244(b)(1). Congress has made no provision for claims that were presented in a prior petition to be relitigated, regardless of the basis for their reassertion. The Sixth Circuit's actions in this case effectively give Thompson a second bite at the apple as to claims previously rejected by the district court. Because those actions directly contravene AEDPA, certiorari is warranted under Sup. Ct. R. 10(c).

B. The Sixth Circuit's decision violates the rule in *Calderon v. Thompson*.

But even if the Sixth Circuit's decision was not subject to §2244(b), it was still plainly inconsistent with the principles underlying this Court's habeas jurisprudence and directly contravenes this Court's decision in *Calderon v. Thompson*, *supra*. While the courts of appeals are recognized to possess inherent power to recall their mandates, subject to review for an abuse of discretion, the

power can be exercised only in "extraordinary circumstances." *Calderon*, 523 U.S. at 549-50. "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.*, at 550. A court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Id.*, at 558. "'[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.'" *Id.*, at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Thus, if the petitioner asserts his actual innocence of the underlying crime, "he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. . . . '" *Id.*, at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, "he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.*, at 559-60 (quoting *Sawyer*, 505 U.S. at 348).

Because the Sixth Circuit failed to perceive its action as the equivalent of a recall of the mandate, it made no attempt to justify its decision in a manner appreciative of the extraordinary nature of the act. Indeed, the court implicitly acknowledged that the *Calderon* standard could not be satisfied, explaining its authority instead on the basis of its outstanding mandate – "Although a court of appeals should withdraw an already-issued mandate only to prevent a miscarriage of justice . . . we rely on our inherent power over a case until our mandate issues in reconsidering our opinion in this case." (App. 6) But since the court's rationale cannot survive the clear language of

Rule 41(d)(2)(D), Federal Rules of Appellate Procedure, *see* Argument I, the court's sole basis for its authority to act is eliminated.

When viewed under the appropriate standard, the evidence presented in this case does not approach the "strong showing of actual innocence" necessary to satisfy the "miscarriage of justice" exception. *Calderon*, 523 U.S. at 557. Indeed, neither the initial nor subsequent opinion of the court of appeals contains any suggestion that Thompson did not kill Brenda Lane or that he is otherwise "innocent" of her murder, a result that is hardly surprising, since Thompson himself confessed to the crime. *Thompson*, 768 S.W.2d at 243. It was Thompson's own statement that led authorities to Brenda Lane's body, *id.*, and as recently as January 19, 2004, Thompson accepted full responsibility for her murder, as noted in the Tennessee Supreme Court's May 2004 opinion. *Thompson*, 134 S.W.3d at 181. (App. 374-75) Rather, the Sixth Circuit concluded that the Sultan deposition, which had not been presented to the district court, would have been probative in analyzing the prejudice prong of Thompson's claim of ineffective assistance of counsel at sentencing, since it could have demonstrated available mitigating evidence related to his mental state at the time of the crime. (App. 2-3, 84-89) The court's analysis falls far short of the demanding standard required to take the extraordinary act of recalling the court's mandate "[i]n light of the 'profound interest in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 549-50 (quoting 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3938, p. 712 (2d ed. 1996)).

After the courts of the State of Tennessee affirmed Thompson's conviction and sentence on direct appeal and

then refused to disturb it on state collateral review, the State ran the gauntlet of habeas corpus review in the federal district court and the court of appeals. Relying on the finality of the Sixth Circuit's January 2003 decision denying federal habeas relief, the courts of Tennessee thereupon took the steps necessary to enforce Thompson's death sentence. In the period between this Court's final disposition of Thompson's request for certiorari in January 2004 and the Sixth Circuit's second decision in June 2004, the Tennessee Supreme Court set a new execution date, ordered expedited competency proceedings in the trial court, disposed of numerous procedural motions seeking to delay execution of the judgment, and issued a detailed opinion following expedited appeal proceedings affirming the trial court's denial of Thompson's claim of incompetence for execution. In short, the State marshalled the full force of its judicial machinery in what should have been the final step toward execution of its judgment. This case, like *Çalderon*, illustrates the extraordinary costs associated with a federal court of appeals' recall of its mandate denying federal habeas relief.

When a court of appeals recalls a mandate to revisit the merits of its earlier decision denying habeas relief, "the State's interests in finality are all but paramount, without regard to whether the court of appeals predicates the recall on a procedural misunderstanding or some other irregularity occurring prior to its decision." *Calderon*, 523 U.S. at 557. Because Thompson has already had extensive review of his claims in both state and federal courts, absent a strong showing of actual innocence, "the State's interests in finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id.* The

Sixth Circuit's surprise reconsideration of its January 2003 decision frustrates the State's "all but paramount" interest in finality and constitutes a grave abuse of discretion. Certiorari is warranted under Sup. Ct. R. 10(a) and (c).

III. BY REMANDING THE CASE FOR A "FULL EVIDENTIARY HEARING" ON RESPONDENT'S INITIAL HABEAS CORPUS PETITION WITHOUT ANY FINDING THAT THE CONDITIONS PRESCRIBED BY 28 U.S.C. §2254(e)(2) WERE MET, THE SIXTH CIRCUIT'S DECISION IS CONTRARY TO AEDPA'S PROHIBITION ON THE GRANT OF EVIDENTIARY HEARINGS IN FEDERAL HABEAS PROCEEDINGS AND CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR*.

Even if the Sixth Circuit had authority to "reconsider" its decision six months after the judgment became final, the court's directive that the district court conduct a "full evidentiary hearing" on the basis of evidentiary material never presented to the Tennessee state courts exceeded its statutory authority under 28 U.S.C. §2254(e)(2). After invoking its "equitable power to supplement the record on appeal" with a deposition that had not previously been presented to either the state courts or (prior to its summary dismissal of Thompson's habeas petition) the federal district court, the Sixth Circuit vacated the district court's grant of summary judgment and remanded the case "for a full evidentiary hearing." (App. 5-6) The court did so, however, without any apparent recognition of, let alone an independent inquiry into, §2254(e)(2)'s limitations on such proceedings.

A motion for summary judgment may only be defeated by disputes over facts that may ultimately affect the

outcome of the proceedings. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986) (materiality determination for summary judgment purposes rests on governing substantive law). And in the habeas corpus context, a federal court may only assess a state court's decision in light of additional facts outside the state-court record if the habeas petitioner was not at fault in failing to develop that evidence in state court, or, if he was at fault, when the conditions of §2254(e)(2) are met. *See, e.g., Holland v. Jackson*, 124 S.Ct. 2736, 2738 (2004) (federal court erred in finding state court's determination of habeas petitioner's ineffective assistance claim to be unreasonable application of *Strickland* based on evidence outside state-court record absent finding that §2254(e)(2)'s conditions were satisfied). The determination whether the Sultan deposition was sufficient to defeat the warden's motion for summary judgment was, therefore, inextricably tied to Thompson's entitlement to an evidentiary hearing under 28 U.S.C. §2254(e)(2). In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court outlined the proper analysis to be performed when a habeas petitioner seeks an evidentiary hearing on claims that have not been developed in state court. A federal court presented with such a request must first ascertain whether the "applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. §2254(e)(2). If the petitioner did not "fail to develop" the claim in state court, the statute will not bar an evidentiary hearing. If, on the other hand, a prisoner has not been diligent in presenting his or her claims in state court, AEDPA prohibits an evidentiary hearing except where §2254(e)(2)(A) and (B) are satisfied. *Id.*, 529 U.S. at 431-37. The Sixth Circuit conducted neither inquiry before remanding Thompson's case to the district court.

In addition, adding to the confusion created by its already erroneous ruling, the court failed to specify which

of Thompson's 26 claims for habeas corpus relief, or even which of the 22 bases for his claim of ineffective assistance of counsel, were encompassed within its mandate of a "full evidentiary hearing." *Compare Williams*, 529 U.S. at 437-44 (performing §2254(e)(2) analysis as to each claim for relief). *See also* 28 U.S.C. §2254(e)(2) ("If the applicant has failed to develop the factual basis *of a claim* in State court proceedings, the court shall not hold an evidentiary hearing *on the claim* unless the applicant" meets the requirements of sub-parts (A) and (B) (emphasis added)). Under the guise of its "equitable" and "inherent" powers, the Sixth Circuit's ruling flouts the clear language of §2254(e)(2) and this Court's decisions. Certiorari is warranted under Sup. Ct. R. 10(a) and (c).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

No. 00-5516

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 98-00006 – R. Allan Edgar, Chief District Judge.

Decided and Filed: June 23, 2004

Before: SUHRHEINRICH, MOORE,
and CLAY, Circuit Judges.

COUNSEL

ARGUED: Dana C. Hansen Chavis, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Dana C. Hansen Chavis, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. SUHRHEINRICH, J. (pp. 7-105), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. Eighteen months ago, this panel in a split decision producing three different opinions affirmed the decision of the district court granting summary judgment to respondent in this habeas corpus action. Judge Suhrheinrich later conducted sua sponte a second, thorough review of the record and came to the conclusion that the facts as adduced in deposition testimony not part of the district court record supported the granting of the writ. *See infra* (Suhrheinrich, J., concurring). Upon reviewing the deposition of Dr. Faye Sultan, and investigating the procedural complications of this case, it is clear that this extremely probative testimony requires that we vacate the district court's grant of summary judgment in favor of respondent.

Judge Suhrheinrich summarizes most effectively the Sultan deposition and its value in assessing Gregory Thompson's mental state at the time of the crime. Where his opinion goes too far is in its accusations of fraud on the court; while his explanation for the omission of the Sultan deposition from the official record before the court is possible in the narrowest sense, the power of this court should not be used to make such accusations without more definite proof than the factual record of this case reveals.

Dr. Sultan's deposition was taken by trial counsel for respondent, but was not included with the evidence submitted as part of Bell's motion for summary judgment. Slightly more than one year later, contemporaneous with the preparation of this appeal, appellate habeas counsel

made a Rule 60(b) motion in the district court asking to include the Sultan deposition as part of the record. At the same time, Thompson's counsel submitted that deposition to this court as part of his motion to hold this appeal in abeyance during the pendency of the Rule 60(b) motion. Applying the principle of Occam's razor, we conclude that more than likely, a genuine mistake was made, one which was not realized until a different attorney looked at the case. To conclude otherwise is to disbelieve sworn testimony by an officer of the court, and to assume that habeas counsel conspired to conceal evidence beneficial to their client, for no discernible reason – evidence loses power, rather than gains it, by being revealed on the "eve of execution" in a second habeas petition Reading Judge Suhrheinrich's opinion, one might conclude that this court had only recently unearthed the Sultan deposition, when in fact it was submitted to the panel prior to oral argument as part of the abeyance motion.

We did not consider it, however, in rendering our decision, believing ourselves to be bound by the record created in the district court. Upon reflection, and after reviewing Judge Suhrheinrich's forceful assessment of the probity of the Sultan deposition, we believe it is appropriate to use our inherent equitable powers to expand the record on appeal to consider the deposition. Ordinarily, a court of appeals should only consider evidence made part of the district court record. Where through error or accident material matters are omitted or misstated, Federal Rule of Appellate Procedure 10(e) allows correction of the appellate record to include the corrected material. *See Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003). While some circuit courts have held that Rule 10(e) allows the inclusion of material the

district court did not consider, *see In re Capital Cities/ ABC, Inc.'s Appl. for Access to Sealed Trs.*, 913 F.2d 89, 97 (3d Cir. 1990) (citing inconsistent circuit precedent); *United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980), the rule in this circuit has consistently been that Rule 10(e) does not allow such inclusion. *See, e.g., Inland Bulk*, 332 F.3d at 1012; *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982). We adhere to our previous interpretation that Rule 10(e) does not allow inclusion in the appellate record of material that the district court did not consider.

Although Rule 10(e) is thus unavailable, we recognize that a number of our sister circuits have held that the courts of appeals have the inherent equitable power to supplement the record on appeal, where the interests of justice require. *See United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000) ("[U]nder some circumstances, we have an inherent equitable power to supplement the record on appeal. However, we conclude the present case" does not present those circumstances.); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986) (relying on *Dickerson, infra*, and exploring circumstances under which exercise of that power is appropriate); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984) ("Although a court of appeals will not ordinarily enlarge the record to include material not before the district court, it is clear that the authority to do so exists."); *Dickerson v. Alabama*, 667 F.2d 1364, 1368 (11th Cir. 1982) (relying on court's inherent equitable powers to supplement the record in habeas case); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) ("[I]n the interest of justice, this court may order the record enlarged."); *Gatewood v. United States*, 209 F.2d 789, 792-93 & n.5 (D.C. Cir. 1953) (sua sponte ordering preparation

of transcript for record "in the interest of both parties, and of the due administration of justice"); *see also* 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3956.4, at 349-51 (3d ed. 1999 & Supp. 2003) ("In special circumstances, however, a court of appeals may permit supplementation of the record to add material not presented to the district court."); 20 *Moore's Federal Practice*, § 310.10[5][f], at 310-19 (3d ed. 2000) ("In extraordinary situations, the circuit court may consider material not presented to the district court when it believes the interests of justice are at stake."). Although recent Sixth Circuit cases indicate that we have not yet "embraced the notion that the record can be supplemented under an appellate court's equitable authority," *see Inland Bulk*, 332 F.3d at 1012, in at least one earlier state habeas case we have so supplemented the record, citing to *Dickerson*, 667 F.2d at 1367. *See Prather v. Rees*, 822 F.2d 1418, 1420 n.1 (6th Cir. 1987) ("Although the parties did not provide the court with copies of the state court briefs, this court may supplement the record when necessary."); *see also Adams v. Holland*, 330 F.3d 398, 405-06 (6th Cir. 2003) (recognizing exception to Rule 10(e) in habeas cases: "where substantial portions of [the state trial transcript] were omitted before the District Court, a habeas case should be remanded to the District Court for consideration in light of the full record."). Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to respondent as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District

Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.

It remains to be explained the source of our power to so reconsider our earlier opinion, as we do not join in Judge Suhrheinrich's allegation of fraud on the court. Instead, we rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case. Although a court of appeals should withdraw an already-issued mandate only to prevent a miscarriage of justice, *see Calderon v. Thompson,* 523 U.S. 538 (1998), at least two of our sister circuits have reconsidered opinions where the mandate has not yet issued. *See Wilson v. Ozmint,* 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and, therefore, we may, at our discretion, 'amend what we previously decided. . . .'") (quoting *Alphin v. Henson,* 552 F.2d 1033, 1035 (4th Cir. 1980)); *First Gib. Bank v. Morales,* 42 F.3d 895, 898 (5th Cir. 1995) (relying on *Alphin,* 552 F.2d at 1035, to reconsider decision where mandate had not yet issued). We therefore rely on our inherent power over a case until our mandate issues in reconsidering our opinion in this case.

The judgment of the district court is therefore **VACATED**, and the case is **REMANDED** for further proceedings not inconsistent with this opinion. Thompson's execution is also **STAYED** for 180 days to permit the district court to proceed.

CONCURRING IN PART, DISSENTING IN PART

SUHRHEINRICH, Circuit Judge, concurring in part and dissenting in part.

I. Introduction

Petitioner-Appellant Gregory Thompson ("Thompson" or "Petitioner") was convicted of first degree murder and sentenced to death by the State of Tennessee. In a previous decision, this Court affirmed the district court's denial of his request for a writ of habeas corpus. *See Thompson v. Bell,* 315 F.3d 566 (6th Cir. 2003), *cert. denied,* 124 S. Ct. 804 (2003). The Supreme Court denied Thompson's petition for writ of certiorari. On February 25, 2004, the State of Tennessee granted the State's motion to set an execution date and has ordered that the Warden of the Riverbend Maximum Security Institution or his designee execute the sentence of death on August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority." This matter is now before this Court on its own motion.

Essential to our conclusion that Thompson was not denied effective assistance of counsel due to counsel's failure to introduce evidence that he suffered from schizophrenia at the time of the offense was our finding that Thompson "has never submitted *to any court* any proof that he suffered from severe mental illness at the time of the crime." *Thompson,* 315 F.3d at 590. Subsequent to the issuance of our decision on January 9, 2003, information has come to the attention of the Court which requires us to

determine whether our decision to affirm the district court's denial of Thompson's petition for writ of habeas corpus relief from his death sentence was improvident.

While reviewing various Sixth Circuit death penalty cases in preparation of a law review article on the subject, an intern in my chambers, who also happens to be a board-certified psychiatrist, expressed concern as to why Thompson's post-conviction expert, Gillian Blair, Ph.D., and Thompson's habeas experts, Barry Crown, Ph.D. and Faye Sultan, Ph.D., had not directly addressed the question as to whether Thompson did or did not exhibit symptoms of a major mental illness at the time of the crime or sentencing, and, if he did, whether the symptoms were sufficient at that point to support a diagnosis of mental illness which should have been presented as mitigating evidence at the sentencing hearing. I then conducted my own review of the entire certified record, in addition to my prior review of the joint appendix. As a result of my review of the entire certified record, I feel that it is incumbent upon me, as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling and issue this opinion. Although I am now merely a concurring/dissenting judge in this matter, I wish it to be known that the initiative for this decision came from my chambers. The majority's ruling is based upon their review of my draft opinion, prepared after my discovery, and the hundreds of hours of work that followed, reviewing the entire record, researching the law, and drafting this opinion.

The question thus is whether our prior ruling was mistaken, because there is, and was, in fact available proof that Thompson was suffering from a serious mental disease or defect at the time of the 1985 offense which

would have substantially impaired his ability to conform his conduct to the requirements of law.[1] Also at issue, and integral to the primary question, is whether the federal habeas counsel in this case committed fraud on the court by intentionally or recklessly failing to present critical evidence on the question, of which they had knowledge, to the district court. For the reasons that follow, we vacate our prior ruling and conditionally grant the writ.

II. Background

The facts are set forth in great detail in our prior opinion. *See id.* However, because the present inquiry involves voluminous facts and procedural history not presented to us on appeal as part of the joint appendix, it is necessary to revisit much of the case, and to review and present the new materials. To the extent possible, I have attempted to present the relevant facts in chronological and procedural order.

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[1] The Tennessee Code Annotated, § 39-13-204(j) lists as a mitigating factor:

> (8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affect the defendant's judgment[.]

Tenn. Code Ann. § 39-13-304(j)(8) (2003).

A. State Court Proceedings

1. Trial Court

Brenda Lane was murdered on January 1, 1985. Thompson was apprehended the next day. On January 29, 1985, the trial court appointed counsel. On February 26, 1985, less than two months after the murder, counsel filed a notice of insanity defense and also requested a mental or psychological evaluation of Thompson to determine (1) whether Thompson was competent to stand trial, and (2) his mental capacity at the time of the crime. On March 25, 1985, less than three months after the murder, trial counsel filed a supplementary motion for a psychiatric examination and a neurological examination to determine (1) whether Thompson was competent to stand trial and assist counsel with his defense, (2) whether Thompson was suffering from a mental illness on the date of the offense, and (3) whether Thompson was in need of hospitalization for further psychiatric treatment and evaluation. The affidavit in support stated that Thompson had previously suffered two concussions, one when he was sixteen years old from a car accident, and the second while in the Navy, when he was beaten in the head with a hammer by three fellow servicemen.

On March 28, 1985, less than three months from the date of the offense, the trial court ordered that Thompson be referred to the Multi-County Mental Health Center for a forensic evaluation to determine (1) his competency to stand trial and to assist in his own defense, and (2) his mental capacity at the time of the crime. On April 4, 1985, the trial court entered another order directing Thompson to undergo a forensic evaluation at a state facility, Middle Tennessee Mental Health Institute ("MTMHI"), for a maximum of thirty days. A team of forensic psychologists

at MTMHI evaluated Thompson and found him to be competent.

Trial counsel questioned the state team's impartiality and requested funds to secure further psychiatric evaluations. On July 29, 1985, the trial court granted counsel funds to hire an independent psychiatrist. Instead, counsel used the funds to hire Dr. Copple, a clinical psychologist. Trial counsel stated that the effort to hire a psychiatrist "was not successful." *Id.* at 573. Also as part of their trial preparation, counsel traveled to Thompson's home town where they interviewed various family members and acquaintances of Thompson.

Thompson did not present a defense at trial, and the jury convicted him of the first degree murder of Brenda Lane. At the sentencing phase, Thompson's former girlfriend, Arlene Cajulao, testified that she knew Thompson from 1980 until June 1984. She described Thompson as caring and sensitive. On cross-examination, she testified to incidents concerning Thompson's violent behavior while in the Navy. Thompson's sister, Nora Jean Walton, testified about his activities in Georgia upon his return from Hawaii after his discharge from the Navy. Dr. Copple also testified. He stated that he spent roughly eight hours examining Thompson over several sessions. Copple stated that during the first session, he was basically looking at what things Thompson would be capable of doing in a prison setting. Copple testified that, in his opinion, Thompson had an unusually strong need to nurture other people that had impelled him to some unwise actions. Copple felt that Thompson did not have an adult antisocial personality disorder. On cross-examination Copple stated that he did not think Thompson was suffering from any mental illness.

The State presented in rebuttal the deposition testimony of Dr. Robert Glenn Watson, who had participated in the staff evaluation of Thompson at MTMHI. Watson found no intellectual impairment. Watson also testified that they found no real evidence of organicity or brain damage. Watson also administered the Minnesota Multiphasic Inventory-II ("MMPI"), but determined that the tests results reflected malingering. Watson further stated that on May 24, 1985, at a staff conference, based on all the data, the staff concluded that:

> [Thompson] exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.)

The staff at MTMHI diagnosed Thompson as Axis 1, Adult Antisocial Behavior, 071.01. The forensic team therefore concluded that Thompson was mentally competent to stand trial and was not suffering from a mental disease or defect.

The jury imposed the death penalty at the conclusion of the penalty phase, and the trial court entered judgment sentencing Thompson to death by electrocution. Thompson thereafter pursued his direct appeals to no avail.

2. Post-Conviction

On October 16, 1990, Thompson filed a petition for post-conviction relief, claiming in relevant part that trial counsel failed to investigate adequately Thompson's background and personal and medical history for the existence of mitigating evidence. *See Thompson,* 315 F.3d at 576. On February 1, 1991, post-conviction counsel filed an *ex parte,* sealed motion seeking "funds to hire a licensed psychologist or psychiatrist and an investigator to assist in the preparation of his case for post-conviction relief." *Id.* at 577. In support, counsel attached the affidavit of Dr. Gillian Blair, a clinical psychologist. Blair noted that Thompson's post-incarceration medical records indicated that Thompson had been variously diagnosed as having bipolar affective disorder, schizo-affective disorder, and schizophrenia, paranoid type, and was taking Lithium, Haldol, and Cogentin. *Id.* Blair opined that "[i]f Mr. Thompson is found to be suffering from neurological or psychological impairment as described above, it is likely that some degree of such impairment would have existed at the time of the offense and would have been a significant factor in determining whether or not Mr. Thompson was able to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law when he committed the homicide of which he stands convicted." *Id.* Blair indicated that Thompson needed a full psychological evaluation. *Id.*

The state trial post-conviction court held an evidentiary hearing on March 27 and March 29, 1995. At the hearing Blair testified that she reviewed Thompson's institutional records, beginning with the 1985 MTMHI assessment. She also interviewed Thompson in March and April 1992, and at that time administered "a basic

psychological battery of tests with some additional ... neuropsychological tests because of the history of head injuries that Mr. Thompson had received and that were well documented in his medical record." *Id.* at 578-79. Blair then articulated the following opinion:

> The Riverbend medical record indicated that since 1985, Mr. Thompson had shown a deteriorating mental status. He had become psychotic. He had been treated with anti-psychotic medication at that time. He was treated with Haldol, Cogentin, and Lithium, and three different treating physicians at that time: Dr. Dyner [sic], Dr. Deal, and Dr. Humble had all over the years from 1985 to 1990 had diagnosed him as either having bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide of [sic] a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him.

Id. at 579.

Blair was also asked what other facts would be necessary for her to develop an opinion as to Thompson's condition at the time of the offense. She stated that "the most

important thing that would be necessary would be a full history and full medical records of Mr. Thompson prior to the commission of the offense." *Id.* She added that:

> From the records I was able to review, it was clear that the social history was very sketchy in terms of his remote history, his childhood and his upbringing, and also family history of mental illness. There seemed to be a [sic] strong evidence to suggest that there was mental illness in his family, probably in his father who committed suicide and was known to be extremely violent and possibly in his mother but none of those records were available.

Id. Blair therefore stated that she did not have an opinion about Thompson's diagnostic status in 1985. *Id.*

On cross-examination, Blair stated that she had reviewed all of the records included in the files from MTMHI. This included daily progress notes, medication sheets, the report of psychological testing, the discharge summary, the admission summary, the staff conference report, and the social worker's history. *Id.* When asked whether she thought MTMHI's testing procedure was unreliable, she averred that it was not unreliable, but simply "not extensive enough." *Id.* Blair further testified that from her own testing,[2] she did not believe that Thompson was faking or attempting to fake mental illness.

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[2] Blair stated that she administered the following tests:

> The tests that I administered in 1992 that directly addressed whether there was psychosis or not, I administered the PAI, I administered the MMPI II which replaces the MMPI which was administered in 1985. I administered the Rorschach, which was not administered in 1985. The PAI

(Continued on following page)

On May 15, 1995, the post-conviction court denied Thompson's claims. The court found that defense counsel had made an adequate investigation into their client's background and prior medical history. The court stated that state post-conviction counsel had presented no proof of mental problems that would have provided Thompson with a defense or shielded him from the death penalty. *Id.* at 580. The Tennessee Criminal Court of Appeals held that Thompson had failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Id.* That court specifically noted that "Dr. Blair declined to give an opinion on these important issues, and the evidence does not preponderate against the trial court's finding that the defense attorneys were not ineffective." *Id.* (quoting *Thompson v. State,* 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997)).

b. Federal Habeas Proceedings

1. District Court

On January 23, 1998, Thompson filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DCTR 1).[3] He also filed a motion and application for appointment of counsel to investigate, prepare and file the petition, pursuant to 21 U.S.C. § 848(q)(4)(B). (DCTR 2).

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was not administered in 1985. I administered the MCMI II and I administered the Rorschach, which is a projective test of personality which was not – the others are all objective. They are all tests in which individual answers true or false and the Rorschach is very different.

Id. at 579-80.

[3] District Court Record ("DCTR").

On January 29, 1998, the court granted Thompson's motion for appointment of counsel and designated the Federal Defender Services of Eastern Tennessee, Inc., to provide Thompson with an attorney to prepare and file a petition for a writ of habeas corpus and "to prepare for and participate in all proceedings in connection therewith." (DCTR 3).

On March 9, 1998, the district court held a scheduling conference. Attorney Stephen M. Kissinger was present representing Thompson. Assistant Tennessee Attorney General John H. Baker III was present on behalf of the State. (DCTR 6). On March 11, 1998, the district court entered a scheduling order. The court required, in relevant part, that disclosure of anticipated use of any expert witness and disclosure of information regarding the expert and the expert's expected testimony was to be completed by Thompson by October 30, 1998. The court directed the Warden to disclose his expert witnesses by December 31, 1998. The scheduling order also provided that the Warden's answer to the petition for writ of habeas corpus was to be filed on or before July 17, 1998, and that the parties file a joint schedule of needed discovery by July 24, 1998.

On May 26, 1998, Assistant Attorney General Glenn R. Pruden became counsel of record for the Warden.

a. The Petition

As required by the scheduling order, Thompson filed his petition for writ of habeas corpus on June 12, 1998. Thompson alleged in relevant part that his trial counsel were ineffective for failing to: (1) perform a reasonable investigation of his background and mental health history; (2) secure adequate expert assistance regarding his mental

health; (3) discover available evidence of mental illness caused by two serious head injuries; and (4) investigate and challenge Thompson's competency to stand trial as well as his competency at the time of the offense.[4] He also

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[4] In fact, the allegation, as stated in his traverse, reads as follows:

The petition alleges in relevant part that:

> In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, petitioner was denied the effective assistance of counsel at the guilt phase of trial, the sentencing phase of trial, on appeal, and in post-conviction proceedings. In particular, counsel failed to perform reasonably, and there is a reasonable probability, sufficient to undermine confidence in the outcome of trial, sentencing, appeal, and post-conviction proceedings, that had counsel performed reasonably, petitioner would not have been convicted or sentenced to death, and/or would have received relief on appeal or in post-conviction proceedings. Specifically, counsel was ineffective for the following non-exclusive list of reasons:
>
> a. Counsel at all critical stages failed to reasonably investigate Mr. Thompson's background and mental health history. Had counsel done so, they would have discovered that Petitioner had, in the years following his graduation from high school, intermittently demonstrated bizarre and delusional thought patterns, particularly during objectively stressful situations. They would have also discovered that members of Petitioner's family, e.g., his father, had a long and pervasive history of severe mental illness. There is a reasonable probability that such evidence, when coupled with evidence presented during trial, would have convinced one or more jurors that Mr. Thompson's confession was not the truth, but rather the product of the interaction between his mental illness, his desire to protect his co-defendant, Joanne McNamara, and illegal questioning by police, as well as to provide relevant mitigating evidence at the sentencing phase of trial. Trial counsel, however, failed to perform a reasonable investigation, failed to find such evidence, and consequently failed to present the following evidence

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> to the jury, both during the guilt phase and during the sentencing phase of the trial.
>
> b. Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors including, but not limited to, three statutory mitigating factors under Tennessee law, i.e, that Mr. Thompson suffered from substantial mental disorders and demonstrable physical brain damage which made him unable to conform his behavior to the law; left him under the influence of extreme mental or emotional disturbance, substantially impaired his ability to appreciate the wrongfulness of his conduct at the time of the offense, *and* non-statutory mitigation under both Tennessee and federal law. As importantly, had counsel secured such mental health history, the result of any professionally adequate pre-trial competency and insanity examination (including, if indeed it was, or had been, professionally adequate, the pre-trial competency examination actually performed in Mr. Thompson's case) would have been different. Specifically, but not exclusively:
>
> i. Counsel failed to discover and interview pertinent, available witnesses who could have testified and or informed appropriate mental health experts of Mr. Thompson's descent into intermittent bizarre and delusional behavior following high school;
>
> ii. Counsel failed to discover available evidence of mental illness caused by two serious head injuries.
>
> iii. Counsel failed to obtain medical and other important records for the purpose of presenting evidence in mitigation.
>
> c. Counsel failed to obtain adequate expert assistance, including confidential psychological, neuropsychological, and neurological experts.

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claimed that he was denied funding for mental health and investigative experts during the state trial and post-conviction proceedings. The petition was signed by Stephen M. Kissinger.

On August 25, 1998, the district court entered an order granting Respondent's motion for extension of time for filing a discovery schedule, moving the deadline to September 2, 1998.

On October 22, 1998, Thompson filed an amended petition for writ of habeas corpus. Thompson contended, in pertinent part, that the state courts denied him funding for mental health and investigative experts at trial and during state post-conviction proceedings, implicating his fundamental rights to due process, equal protection, and effective assistance of counsel. (DCTR 17). Thompson also complained that he was denied expert funding, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. He alleged in relevant part:

a. Both trial and post-conviction counsel knew Petitioner's mental state was an important issue but without assistance from a competent investigator and mental health expert, counsel was unable to explain and overcome the state mental hospital's initial findings.

b. Attorney Parsons was aware of Petitioner's history of head injuries and "the significant [sic] of those head injuries and what that can do to somebody." P.C. Vol. I, p. 38. Later,

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d. Counsel failed to investigate and challenge Petitioner's competency to stand trial as well as his competency at the time of the offense.

counsel also witnessed "a period when he [Petitioner] got sick mentally." P.C. Vol. I, p. 83. Trial counsel requested funds for a mental health expert but were denied. Instead, Petitioner was sent to Middle Tennessee Mental Health Institute (MTMHI) for a competency evaluation. Although MTMHI found Petitioner to be competent, Mr. Parsons continued to believe further evaluation was needed. . . .

c. Records from Riverbend Maximum Security Institution reflect that several different treating psychiatrists have diagnosed Petitioner as having either a bipolar affective disorder, cyclic mood disorder, schizo-affective disorder or schizophrenia. All of the psychiatrists described Petitioner's agitated behavior, hostility, inappropriate affect, auditory and visual hallucinations, delusions, paranoia, and thoughts of persecution. Psychiatrists considered the possibility of Petitioner's malingering and all discounted that possibility. State examiners at Riverbend ruled out malingering noting that it did not explain all psychotic features. Test results indicating schizophrenia were found consistent with Petitioner's psychotic disorder even at his then current "stable" level of functioning. Since his incarceration, Petitioner has been heavily medicated. For example, Petitioner has taken Lithium and Klonopin, both indicated for bipolar disorder; Depakene and Depakote indicated for epileptic conditions and rapid cycling bipolar disorder due to brain disease; the anti-psychotic drugs Haldol, Haloperidol, Mellaril, Navane, Thioridazine, and Trilafon; Cogentin/Benztropine

to minimize the effect of such drugs; the sedative Vistaril; and, Ativan/Lorazepam and Valium to reduce agitation.

d. Post-conviction counsel repeatedly requested funds for a mental health expert. The prosecutor argued that post-conviction counsel were not entitled to experts at state expense. P.C. Vol. 1, p. 16. In support of the motion for funding, counsel submitted the affidavit of Dr. Gillian Blair. Dr. Blair's affidavit and post-conviction testimony reflected her need for a complete social history, additional testing and interviews before she could render an opinion on Petitioner's mental status at the time of the crime, at trial, and at the present time. *See generally* P.C. Vol. I, pp. 199-219. Dr. Blair opined that based on the Riverbend records, her test results from 1992, and the brief social history available, further investigation and examination of Petitioner was required. Dr. Blair testified that since 1985 Petitioner had shown a deteriorating mental status. P.C. Vol. II, p. 209. Petitioner had been diagnosed with bipolar disorder, schizo affective disorder or schizophrenia. *Id.* She further testified that schizophrenia and bipolar disorder, indeed all forms of psychosis, generally begin in early adulthood, *Id.* at 215, which coincides with the timing of the instant offense. Dr. Blair stated that Petitioner's troubles in the Navy, just prior to the crime, would suggest that he was becoming mentally ill at that time. *Id.* at 216. However, further information was needed to render an opinion and diagnosis of Petitioner at that time. Dr. Blair also stated that further

evaluation of Petitioner was necessary to determine his present competency. *Id.* at 207.

e. The court denied funding for expert assistance at the post-conviction hearing. The court reasoned that funds were unnecessary because Petitioner had not shown a "need," further funding would result in a delay of the proceedings and the issue was a matter of record. . . .

f. Although the court found no "need" for further expert assistance, the court later used the fact that Dr. Blair could not express an opinion as to the issues of Petitioner's mental health to limit Dr. Blair's testimony and, subsequently, to deny Petitioner relief from his unconstitutional conviction and sentence. For example, throughout Dr. Blair's testimony, the prosecutor made repeated objections on the basis that Dr. Blair did not have an ultimate opinion. *See e.g.* P.C. Vol. II, pp. 208, 215, 216, 220, 259. Although the court allowed most of Dr. Blair's answers, it did so remarking that the weight of the testimony was specious. *See id.* The court, however, did not allow Dr. Blair to testify about mitigating circumstances.

(Footnotes omitted.).

Thompson further alleged ineffective assistance of counsel, for the following non-exclusive reasons:

1. Counsel at all critical stages failed to reasonably investigate Mr. Thompson's background and mental health history. Had counsel done so, they would have discovered that Petitioner had, in the years following his

graduation from high school, intermittently demonstrated bizarre and delusional thought patterns. They would have also discovered that members of Petitioner's family, e.g., his father, had a long pervasive history of severe mental illness. Trial counsel, however, failed to perform a reasonable investigation, failed to find such evidence, and consequently failed to present the following evidence to the jury, both during the guilt phase and during the sentencing phase of the trial.

2. Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors including, but not limited to, three statutory mitigation factors under Tennessee law, i.e., that Mr. Thompson suffered from substantial disorders and demonstrable physical brain damage which made him unable to conform his behavior to the law; left him under the influence of extreme mental or emotional disturbance, substantially impaired his ability to appreciate the wrongfulness of his conduct at the time of the offense, *and* non-statutory mitigation under both Tennessee and federal law. As importantly, had counsel secured such mental health history, the result of any professionally adequate pre-trial competency and insanity examination (including, if indeed it was, or had been, professionally adequate, the pre-trial competency examination actually performed in Mr. Thompson's case)

would have been different. Specifically, but not exclusively:

i. Counsel failed to discover and interview pertinent, available witnesses who could have testified and/or informed appropriate mental health experts of Mr. Thompson's descent into intermittent and delusional behavior following high school

. . . .

. . . Had counsel been informed, they would have recognized that witness accounts, of Petitioner's bizarre change in behavior signaled the onset of mental illness. The lingering question would have been answered. The outcome of Petitioner's capital conviction and sentence probably would have been different.

(DCTR 17; footnotes omitted). The amended petition for writ of habeas corpus was signed by Stephen M. Kissinger.

b. Discovery

On November 2, 1998, the magistrate judge held three telephone conferences with Attorney Kissinger and Assistant Attorney General Jennifer Smith regarding Thompson's request for discovery regarding those matters alleged in the petition, to which Respondent objected. The court's order states that, during the hearing, Kissinger advised that he needed to obtain the depositions of three mental health expert personnel who had seen and treated Thompson during his period of incarceration. Respondent maintained his objection that the allegations before the court did not establish good cause for discovery as required under Rule 6(a) of the Rules Governing Section 2254 Cases

in the United States District Court. That same day the court entered an order allowing Thompson to take the depositions of Dr. Michael Rutter, Dr. Robert Hoen, and Dr. John Pruett, mental health experts. The order further allowed Respondent the right to take the depositions of Thompson's two experts, neuropsychologist Barry Crown, Ph.D, and psychologist Faye Sultan. (DCTR 18). The magistrate judge noted that the execution of Thompson would violate the Eighth Amendment due to Thompson's incompetence. The order also noted a *Brady* claim.[5]

Also on November 2, 1998, Thompson filed his initial witness list. His "[e]xpert witnesses and testimony" included the following:

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[5] Although not fully articulated as such, the magistrate judge appears to have based its conclusion on the following allegation in Thompson's amended petition, which the court quoted in its order:

> 41. CLAIM 41 – BRADY CLAIM
>
> a. Throughout Petitioner's court proceedings the prosecutor engaged in false and/or misleading questioning and use of reports to argue that Petitioner was competent and not mentally ill. The prosecutor misled Petitioner's judge and jury despite having evidence to the contrary, and without revealing such evidence, thereby committing gross misconduct. For example, during the Petitioner's postconviction proceedings, the state argued that Petitioner was not mentally ill, was competent at the time of trial, was presently competent, and was competent to be executed, despite ten years of records to the contrary. Institutional records clearly illustrate Petitioner's 'significant history of psychosis requiring multiple medications.' Petitioner's mental health treatment plan contemporary to the postconviction hearing reveals a diagnosis of schizophrenia with presenting problems of auditory and visual hallucinations and paranoid ideation. . . .

(DCTR 18).

a. Dr. Barry Crown, Penthouse Ste 310, Red Road, South Miami, FL 33143, will provide foundation testimony to establish himself as an expert in neuropsychology. He will testify that he has been provided with background information regarding Petitioner's medical and social history, that he has interviewed, and administered a battery of indicated neuropsycholgical tests to the Petitioner. He will testify that the results of those tests indicate that Petitioner suffers from organic brain damage. *He will testify that the brain damage observed, as well as Petitioner's social and medical history, is consistent with schizophrenia. He will testify that Petitioner's brain damage substantially impaired the ability of the Petitioner to distinguish between right and wrong and/or to conform his conduct to the requirements of the law and/or prevented Petitioner from doing the same.* He will testify that Petitioner's brain damage prevented Petitioner from meaningfully assisting in his own defense at trial and during state post-conviction proceedings and/or from fully comprehending the nature of those proceedings. He will further testify that arguments regarding Petitioner's mental state made by counsel for the State of Tennessee during state post-conviction proceedings were both outside the scope of a lay person's knowledge and that the prosecutor's statements misrepresented Petitioner's prison medical records.

b. Dr. Faye Sultan, 8430 University Executive Park Drive, Suite 690, Charlotte, NC 28262, will provide foundation testimony to establish herself as an expert in clinical and forensic psychology. She will testify that she has been provided with background information regarding Petitioner's medical and social history, that

she has interviewed, and administered a battery of indicated psychological tests to the Petitioner. *She will testify that, on the basis of her examination, it is her expert opinion that Petitioner suffers from schizophrenia and did so at the time of the offense and at the time of trial. She will testify that Petitioner's mental illness was severe and that it substantially impaired the ability of the Petitioner to distinguish between right and wrong and/or to conform his conduct to the requirements of the law and/or prevented Petitioner from doing the same.* She will testify that Petitioner's mental illness prevented Petitioner from meaningfully assisting in his own defense at trial and during state post-conviction proceedings and/or from fully comprehending the nature of those proceedings. She will further testify that arguments regarding Petitioner's mental state made by counsel for the State of Tennessee during state post-conviction proceedings were both outside the scope of a lay person's knowledge and that the prosecutor's statements misrepresented Petitioner's prison medical records.

(DCTR 19) (emphases added).

On November 30, 1998, Respondent appealed the magistrate judge's discovery order. The district court affirmed the ruling. Significantly, the district court stated the following:

> Additionally, if the facts are developed to show that petitioner's mental health should have been introduced as mitigating evidence, petitioner may be entitled to relief. The magistrate judge heard argument of counsel and then ruled that certain specific discovery would be allowed. . . . Not only has Thompson raised the

> issue of ineffective assistance of counsel for failure to fully explore his mental health for mitigating purposes at his sentencing, which trial counsel testified he should have explored Thompson's mental health further . . . ; the record also includes factual allegations that there was some mental health evidence that could have been introduced as mitigating evidence. Furthermore, Thompson alleges he did not receive a full and fair post-conviction hearing in state court because he was denied funds to hire a mental health expert to prove his incompetency/insanity at trial and at execution. If the fact are fully developed, he may be able to demonstrate he is entitled to relief.
>
> After a cursory review of the numerous volumes of state documents[ ] involved in this case, it appears that Thompson has alleged a factual basis for some of his claims and the magistrate judge so found. For example, petitioner claims trial counsel failed to properly investigate his mental health history and present mitigating evidence at trial and sentencing. Petitioner contends he had two serious head injuries and intermittent bizarre and delusional thought patterns and witnesses to testify to such, and this mitigating evidence should have been introduced. Furthermore, petitioner contends that his institutional records reveal a diagnosis of schizophrenia with problems of auditory and visual hallucinations and paranoid ideation. If petitioner proves these factual allegations, he may be entitled to relief.

(Footnote omitted) (DCTR 22).

On December 24, 1998, Respondent filed his initial expert witness list disclosure. It listed simply Dr. Theodore H. Blau, who would "testify as an expert in the area of

forensic neuropsychology. Dr. Blau will be called, if necessary, to rebut the testimony of petitioner's expert witnesses, Dr. Barry Crown and Dr. Faye Sultan, as disclosed in petitioner's initial witness list of October 30, 1998." (DCTR 24).

On December 29, 1998, Attorney Kissinger moved to appear *pro hac vice*. (DCTR 25).

On February 3, 1999, the district court granted Thompson's request for an extension of time to conduct discovery. The court set the discovery date at June 11, 1999, and the dispositive motion cutoff at July 2, 1999. (DCTR 32).

On February 12, 1999, Thompson filed an *ex parte* motion for a temporary mandatory restraining order, for preliminary and permanent injunctive relief, and for an order finding Thompson incompetent to proceed, continuance, and to toll. (DCTR 34). In support, Thompson alleged in part as follows:

> 1. Petitioner suffers from schizophrenia. During the vast majority of his incarceration Respondent has medicated Petitioner in order to treat his mental illness.
>
> 2. On or about September 1998, Respondent stopped providing Petitioner with appropriate psychiatric medication.
>
> 3. Petitioner's mental health thereafter radically declined. Petitioner is now unable to meaningfully assist counsel or understand the nature of the proceedings in which he is being required to participate. Moreover, because of the severe nature of Petitioner's mental illness, Respondent's refusal to provide appropriate psychiatric care is tantamount to subjecting Petitioner to physical torture. *See,* Exhibit A, Declaration of Faye Sultan PhD. attached.
>
> . . . .
>
> 6. Petitioner has no remedy at law. . . . Given the Petitioner's incontrovertible right both to receive proper psychiatric care and to seek federal habeas corpus relief the likelihood that he will prevail on the merits of his motion are great. Should Respondent be allowed to continue to deprive Petitioner of proper psychiatric care Petitioner will suffer irreparable injury. Not only is he being rendered incompetent, he is, for all intents and purposes, being tortured.

(Footnotes omitted.). The motion was signed by Attorney Kissinger (by permission). (DCTR 34).

Attached to the February 1999 motion is the declaration of Faye Sultan, Ph.D, a clinical psychologist. Sultan stated in relevant part that

> At the request of attorneys at the Federal Defender Services of Eastern Tennessee, I initiated a psychological evaluation of Mr. Gregory Thompson in August, 1998. Formal psychological testing and extensive clinical interview were conducted with Mr. Thompson at the Riverbend Maximum Security Prison in Nashville, Tennessee on 8-20-98. This interview was conducted as a "Contact Visit", with no physical barrier between this examiner and Mr. Thompson, and Mr. Thompson was not physically restrained in any way.

> In addition to the data gathered during this examination, I was asked to review extensive documentation about Mr. Thompson's psychiatric, military, and legal history. These data also serve as bases for the opinions rendered here. These data include psychiatric records and examinations regarding Mr. Thompson for approximately the past fifteen years, administrative and medical records from the Tennessee Department of Corrections, and legal and police documents relating to the original offenses for which Mr. Thompson is currently incarcerated. In total, hundreds of pages of records and documents have been reviewed for the purpose of this evaluation.

(DCTR 34). Dr. Sultan also stated that in August 1998 Thompson met all of the diagnostic criteria for the major mental illness schizophrenia, episodic, with interepisode residual symptoms. She further indicated that Thompson's condition had rapidly deteriorated between August 1998 and February 1999. In Dr. Sultan's opinion, Thompson was experiencing a severe psychiatric crisis, making him unaware of his surroundings, and requiring immediate emergency attention. (*Id*).

On April 7, 1999, Thompson moved to withdraw his *ex parte* motion for injunctive relief and for an order finding him incompetent to proceed, principally because on April 6, 1999, Dr. Sultan saw Thompson and concluded that his condition had improved, due to an adjustment in his medication. Thus, the factual basis for the motion no longer existed. (DCTR 64). On April 29, 1999, the court granted the motion to withdraw the ex parte motion. (DCTR 67).

On June 28, 1999, the district court entered an order extending the discovery deadline to July 30, 1999. The

court extended the deadline to allow Respondent to depose Thompson's expert witnesses, Drs. Crown and Sultan, and to allow Petitioner to depose Respondent's expert witness, Dr. Theodore Blau. On July 9, 1999, Respondent filed a motion for summary judgment as to all claims raised in the amended petition for writ of habeas corpus. (DCTR 81-82). On July 15, 1999, Thompson deposed Respondent's expert, Dr. Blau. On July 20, 1999, Respondent deposed Petitioner's expert. Dr. Crown.[6] On July 29, 1999, Thompson filed his response to Respondent's motion for summary judgment.

On August 2, 1999, Respondent filed a motion for reimbursement of deposition expenses. (DCTR 87). Respondent claimed that Dr. Crown's deposition testimony was considerably different than that represented in Petitioner's initial witness list. Specifically, Respondent alleged that, based on Petitioner's initial disclosure concerning Dr. Crown's testimony, particularly as to Petitioner's mental state at the time of the offense, "*i.e.*, his ability to distinguish between right and wrong and/or to conform his conduct to the requirements of law, competency at the time of trial," counsel for Respondent traveled to Miami, Florida to depose Dr. Crown. Respondent further claimed that, at the beginning of the deposition, he was presented "for the first time" with an affidavit indicating Dr. Crown's proposed testimony, which was significantly different from the October 30, 1998, initial witness list disclosure. The affidavit indicated no opinion as to Thompson's mental state at the time of the offense or at

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[6] As will be explained shortly, counsel for Respondent deposed Thompson's other named expert, Dr. Faye Sultan, PhD. on July 22, 1999.

trial, no opinion indicating that brain damage substantially impaired Thompson's ability to conform his conduct to the requirements of law and/or to distinguish between right and wrong, and no opinion concerning Thompson's ability to assist counsel in his defense at trial or comprehend the nature of that proceeding.

Respondent alleged that, "contrary to representations in Petitioner's initial expert disclosure, Dr. Crown testified in his deposition that he had not rendered, nor had he been asked to render, an opinion concerning Petitioner's mental status at the time of the offense in this case." (DCTR 87). The motion stated that Dr. Crown testified that he was also not asked to render an opinion concerning Petitioner's competence at the time of trial. The motion further alleged that "Dr. Crown testified that he had seen petitioner on one occasion, June 12, 1998, and was prepared to render an opinion concerning petitioner's competence and mental status on *that* day." Thus, in Respondent's view, "Dr. Crown offered no testimony pertinent to any claim presented in the amended petition for writ of habeas corpus." Respondent therefore claimed that, had he been advised of the precise nature of Dr. Crown's testimony, as required under Fed. R. Civ. P. 26(a)(2)(B) and by the district court's order of March 11, 1998, he likely would not have deposed Dr. Crown. Respondent contended that, given the clear representations in his October 1998 expert disclosure statement, Petitioner had a duty to disclose the nature of Dr. Crown's testimony. Respondent sought an order requiring Petitioner to reimburse Respondent in the amount of $2,768.71 for expenses incurred in connection with the July 20, 1999, deposition of Dr. Crown.

On August 4, 1999, Petitioner filed a motion in limine, seeking to exclude Dr. Blau's testimony on the grounds

that Dr. Blau neither formed an opinion nor was asked to form an opinion regarding any of the issues raised in the petition: "Despite all issues being clearly framed by the allegations in the petition, Respondent never sought, nor did Dr. Blau render, any opinion contrary to such allegations." (Footnote omitted.). (DCTR 88). Also on August 4, Petitioner filed a motion for costs incurred in deposing Dr. Blau. Petitioner alleged in pertinent part:

> 2. On July 15, 1999, undersigned counsel conducted the deposition of Dr. Blau in order to discover the substance of his testimony at the evidentiary hearing. At that time Dr. Blau testified that he had been asked to render an opinion only in regard to Mr. Thompson's competency to proceed in the instant action . . . ; that he had not reached any opinion other than that reflected in his report on the competency to proceed . . . ; and that in order to render additional opinions he would require further interviewing and testing of Mr. Thompson. . . .
>
> 3. It is clear that although Respondent was on notice of Petitioner's mental health claims which are detailed in his habeas petition and was on notice regarding Petitioner's anticipated expert's testimony, Respondent either instructed Dr. Blau not to render any opinion during deposition regarding the issues in the petition or Dr. Blau failed to formulate such opinions. *It appears that Respondent made the strategic decision to limit Dr. Blau's testimony to Mr. Thompson's competency to proceed given Dr. Blau's sworn testimony that his opinion was limited to Mr. Thompson's competence to proceed, the fact that Dr. Blau only evaluated Mr. Thompson on one occasion for the specific purpose of competency to proceed, and*

that Respondent did not provide a copy of Petitioner's habeas petition to Dr. Blau.

4. Undersigned counsel relied upon Respondent's representation that Dr. Blau would rebut Petitioner's expert witnesses. Had undersigned known that Dr. Blau's opinion was limited to Mr. Thompson's competency to proceed, an issue which is no longer before this court, he would not have taken Dr. Blau's deposition and incurred expenses totaling $4,097.01.

(DCTR 89) (emphasis added) (footnote omitted). Petitioner requested a court order requiring Respondent to pay those costs. The motion for costs is signed by Stephen M. Kissinger.

On August 5, 1999, Thompson filed a response opposing Respondent's motion for reimbursement of deposition expenses. In it he contended that the opinions Dr. Crown expressed in his deposition were materially consistent with Thompson's initial witness list. In response to Respondent's contention that Dr. Crown failed to provide an opinion at deposition regarding Thompson's mental condition at the time of the offense, Thompson stated that "[t]his allegation is untrue or irrelevant for at least two reasons." First,

5. Insofar as Respondent's complaint relates to Dr. Crown's response to the Assistant Attorney General Pruden's very few questions which Respondent elected to attach to his motion, Dr. Crown was not asked whether he had an opinion regarding Petitioner's mental condition at the time of the offense *or* at trial. Instead Mr. Pruden

chose to focus on the communication between Dr. Crown and Respondent's counsel.[7]

. . . .

7. Not one of these questions asked whether Dr. Crown had an opinion on the issue of mental state at the time of the offense, at trial, or at any other time for that matter. They queried only regarding the communications between Dr. Crown and undersigned counsel. As a matter of fact, only once in the excerpts attached to Respondent's motion does Mr. Pruden ask any question which could reasonably be interpreted as seeking Dr. Crown's opinions on these issues.

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[7] 6. Respondent posed the following questions:

Have you been asked to render any determination about whether he was competent to stand trial at his criminal trial?

(Crown deposition at Page 7, lines 11-13)

So if I understand you correctly, you were only asked [by Respondent's counsel] to make a competency determination at the time you met Mr. Thompson?

(*Id.* at Page 7, lines 19-21)

Have you been asked to render any opinions concerning Mr. Thompson's mental status at the time of the murder of Brenda Lane?

(*Id.* at Page 8, lines 7-9)

Not specifically. Does that mean that you have not been asked that specific question?

(*Id.* at Page 8, lines 11-12[)]

So you have not been asked to render an opinion to Mr. Kissinger yet one way or the other regarding Mr. Thompson's ability to distinguish between right and wrong or conform his conduct to the requirements of the law at the time of Ms. Lane's murder?

(*Id.* at 17-20).

8. On that occasion, Dr. Crown responded that he was unable to render such an opinion because he could not be certain whether he had been provided all relevant information. Crown deposition at Page 9, lines 4-15. Rather than show that he had no opinion on a material issue, Dr. Crown's answer demonstrated that he would not carelessly issue an opinion until counsel for Respondent defined the facts upon which counsel wished Dr. Crown to base that opinion. Despite Dr. Crown's qualified response, counsel for Respondent never asked Dr. Crown whether, *assuming that Dr. Crown had all relevant information,* he had an opinion regarding Mr. Thompson's mental state at the time of the offense and/or at trial, nor did counsel provide Dr. Crown with supplemental fact which Respondent deemed relevant and then ask him whether, based upon the combined information, he held an opinion on those regards.

9. The reasons Respondent failed to discover Dr. Crown's opinions in these areas were not because Dr. Crown held no such opinions. Respondent's counsel either made a strategic decision to focus on the conduct of counsel (or perhaps to attempt to create the *illusion* that Dr. Crown's opinions regarding these areas will come as a complete surprise to the Respondent when they are stated at hearing), *or* he simply neglected to ask the relevant questions.

(DCTR 90).

Thompson articulated a second reason, namely that Dr. Crown's deposition did substantially conform to the information contained in his initial witness list because Crown stated during his deposition "that Petitioner suffers from bipolar disorder of a schizo-affective type *and* that

the onset of this affliction was prior to the alleged offense. Crown deposition at Pages 32-34, *in passim.*" Thompson added that "[u]nless Respondent can seriously maintain that it is *material* in this case whether Dr. Crown found that Petitioner suffered from one severe schizotypal mental illness *at the time of the offense as well as his state court trial* rather than another severe schizotypal mental illness, Dr. Crown's deposition testimony is clearly consistent with the information contained in Petitioner's Initial Witness List." Thompson also alleged that Respondent was not in a position to complain that Dr. Crown's testimony did not make the connection between Petitioner's mental illness and competency at the time of the offense, because Respondent "with full knowledge that Dr. Crown was of the opinion that Petitioner was severely mentally ill at the time of the offense, either chose not to inquire regarding the afore-described connection or *forgot to do so.*" (DCTR 90) (emphasis added). Thompson therefore claimed that he had demonstrated that the information in his initial witness list was consistent with Dr. Crown's testimony. He further claimed that even if it was materially inconsistent, Respondent could not complain because he had previously made this allegation to the magistrate judge, who granted Respondent the right to depose both Drs. Crown and Sultan before Respondent ever contacted Dr. Blau. Thus, Thompson claimed that Respondent had been granted the opportunity to determine the exact opinions of Dr. Crown before Dr. Blau was ever contacted. (DCTR 90).

Next, Thompson asserted that Dr. Blau stated during his deposition that he was contacted by Respondent's counsel, Pruden, on November 2, 1998, to retain him as a psychological expert and that he was asked simply "to

review records in respect to competence to proceed regarding Mr. Thompson, and possible questions were whether Mr. Thompson is competent to act as a party participant in habeas corpus proceedings," and also whether he "could determine psychologically his mental condition and status with respect to his capacity to understand his legal position and his options." (DCTR 90) (quoting Deposition of Theodore H. Blau, Ph.D., July 15, 1999, Page 5, lines 8-19). Thompson further alleged that Dr. Blau was asked whether he had been asked to examine Thompson regarding any area other than competency and that "[h]is response clearly demonstrated that not only had he not examined and/or reached any opinions in any area other than Petitioner's present competency, the only neuropsychological examination he had conducted was 'at best' . . . a screening examination." (DCTR 90 ¶ 6). Thompson therefore moved for an order denying Respondent's motion for reimbursement of deposition expenses. (DCTR 90).

In his reply, Respondent stated simply that the documents attached to its motion for reimbursement plainly demonstrated that Thompson's October 1998 disclosure was materially different from the testimony offered at Dr. Crown's deposition and in his affidavit. (DCTR 91). Attached as an exhibit was a complete copy of Dr. Crown's July 20, 1999, deposition. Much of it bears repeating here:

Q: Specifically, what issues regarding Mr. Thompson and his case have you been asked to review and render expert opinions on, sir?

A: At this point, I have been asked to consider his competency and also his mental status.

Q: Okay. Let's take them one at a time, then. Competency, are you talking strictly about his present competency in the habeas corpus proceedings?

A: I am talking about his competency at the time that I saw him.

Q: Have you been asked to render any determination about whether or not he was competent to stand trial at his criminal trial?

A: No.

Q: Has anything been said to you that would lead you to believe that you might be asked at a future date prior to the evidentiary hearing to render such an opinion?

A: It hasn't been suggested or asked of me.

Q: So if I understand you correctly then, you were only asked to make a competency determination at the time you met Mr. Thompson?

A: That is correct.

Q: And when was that, sir?

A: June 12th of 1998.

Q: All right. *His mental status. Please elaborate for me, what about his mental status have you been asked to opine?*

A: *I have been asked to evaluate it.*

Q: His mental status at present?

A: Well, it was his status as of the time that I saw him. I haven't seen him since June 12th of 1998.

Q: *Have you been asked to render any opinions concerning Mr. Thompson's mental status at the time of the murder of Brenda Lane?*

A: *Not specifically, no.*

Q: *Not specifically. Does that mean that you have not been asked that specific question?*

A: *That is correct.*

Q: *Have you rendered an opinion, though, in that regard?*

Q [sic]: *No, not as of this time.*

Q: *So you have not rendered an opinion to Mr. Kissinger yet one way or another regarding Mr. Thompson's ability to distinguish between right and wrong or conform his conduct to the requirements of the law at the time of Ms. Lane's murder?*

A: *That is correct.*

Q: *Has Mr. Kissinger, or anyone else representing Mr. Thompson, represented to you that they would like you to render such an opinion during the course of your employment?*

A: *No.*

Q: Just so I am clear then, your mental status evaluation of Mr. Thompson is only to evaluate his mental status at present?

A: I have only seen him on one occasion, June 12th of 1998. So what I have to say would be related to that examination. I have looked at other records, but I don't know they are necessarily complete, and I couldn't render an

opinion based on the lack of completeness, or what I assume is the lack of completeness.

Q: So you don't feel that based on the materials that you have reviewed to date that you could, based on your professional experience, render an opinion about Mr. Thompson's mental state say back in 1985 at the time of the murder?

A: As I sit here today, I could not.

Q: So you are not prepared to render any opinion in that regard today?

A: That is correct.

Q: What materials have you been provided to review concerning Mr. Thompson?

A: I have seen what I believe to be his Department of Corrections file from it's [sic] inception.

Q: And when you say his Department of Corrections file, do you mean his medical/mental health file?

A: It's his medical file, as well as his general file, including disciplinary reports, including adjustment reports.

Q: Have you reviewed any other records?

A: I have seen the depositions of three of the employees of Prison Health Services. I have seen the reports of the mental health facility that Mr. Thompson spent thirty days in prior to his original trial. I have seen the testimony of the mental health professions at his trial, Dr. Kogley.

Q: Cobley?

A: Cobley. I have seen the materials from Dr. Blaire.

Q: How about Dr. Watson?

A: Watson. I have seen Dr. Watson.

Q: When you say materials from Dr. Blaire, does that simply mean her testimony, or have you seen other –

A: I have seen the raw data, or parts of raw data. Actually, the entire raw data are not in the materials that were provided to me. And then I have seen Dr. Blau's report and Dr. Blau's raw data.

Q: And you just received Dr. Blau's –

A: Correct.

(DCTR 91).

Dr. Crown also indicated that he had reviewed Thompson's medication portfolio from his records at Riverbend Maximum Security Institution. When asked, Dr. Crown stated that he had not read, and not been asked to read, the trial transcript, but that he had asked Mr. Kissinger "to provide me with whatever materials he wished." (DCTR 91). Dr. Crown acknowledged that he had not given Kissinger a specified list of items he wished to review, but was "relying on whatever it is Mr. Kissinger" gave him.

Dr. Crown also stated that he met with Thompson on June 12, 1998, at Riverbend for about two and one half hours. Dr. Crown indicated that, at that time, he took a brief history, a standard basic demographic clinical

interview, and administered a group of tests.[8] Dr. Crown testified that the only written record of his evaluation was his July 20 affidavit; that he would only prepare a written report if Kissinger asked. He also indicated that Kissinger had not at that time asked him to do so.

Dr. Crown opined that Thompson suffers from an auditory processing deficit. He further indicated that Thompson has some sort of organic brain damage, but that he did not pinpoint it to a specific portion of the brain. Dr. Crown stated that he did not intend to make any further evaluation of Thompson's organic brain damage unless asked. Dr. Crown indicated that he knew that Thompson had suffered traumatic head injuries. He testified that he had not seen Thompson's military medical records. Dr. Crown testified that the organicity was secondary to other mental impairments, namely schizo-affective disorder, bipolar subtype, with organic components. Dr. Crown stated that he reached this conclusion

> from looking at the reports of the treating physician, the psychiatrists, and psychiatric nurses, and nurse practitioners that have had the opportunity to monitor him over the last fourteen years, that I have concluded that he's best treated with anti-psychotic medication, that schizo-affective disorder is a disorder that affects

[8] Dr. Crown stated that he administered the following tests: The Shipley Institute of Living Scale; the G-F-W Auditory Selective Attention Test; the Category Test; the Kaufman Neuropsychological Assessment Procedure; the Luria Memory Test; the Reitan-Indiana Aphasia Screening Test; the Rey-Osterreith Complex Figure Test; the Trailmaking Test; Word Generation, F/A/S; Finger Oscillation Test; and the Wisconsin Card Sorting Test.

thoughts related to reality and results in distortions of reality.

It also results in distortions of affect, meaning, the way that behavior is expressed. And I believe that his affect has been variable from rather depressed to highly agitated and aggressive. And so, putting that together, I believe he does have a schizo-affective disorder of the bipolar type, meaning, there is a considerable spread in his emotionalities, that there is a distortion in his perception of reality, that he tends to fragment at times, and tends to be directed by hallucinatory activity.

. . . [I]n Mr. Thompson's case, there are notations throughout his medical records that he has auditory hallucinations. He also related to me that at the time I saw him he was auditory hallucination free, but that he frequently got command hallucinations that there were voices coming from within him that were telling him what to do, which is what happens in an auditory hallucination state.

(DCTR 91). The following colloquy between counsel for Respondent and Dr. Crown, then took place:

> Q: Based on your review of Mr. Thompson's records or the records that were provided to you, what do you conclude, or when did you conclude, was the onset of these auditory hallucinations?
>
> A: *I have no real pinpoint. For that, most typically, people with schizo-affective disorder tends to develop in late adolescence to early adulthood.*

> Q: From the materials you have reviewed, do you see anything in those materials that show that this is when it occurred in Mr. Thompson?
>
> A: *I believe he began to have a more difficult time with life in his – in the last stages of his military service. So I believe that the beginnings of it would be tracked to that. I haven't seen the records, but I believe that that's probably when I would anticipate that it would have begun.*

(Emphases added.)

Counsel for Respondent also asked Dr. Crown whether he had talked with any of Thompson's family members to gain insight into his background while growing up. Dr. Crown stated that he had not, nor had he spoken with school teachers, counselors, or ministers. Dr. Crown also indicated that he had not spoken with Joanne McNamara, or Arlene Cajulao.

Next, counsel asked Dr. Crown:

> Q: And if I understood your answers earlier correctly, you do not have an opinion at this time as to the exact nature of this brain damage for which you have seen some indicia?
>
> . . . .
>
> A: I don't specifically know the causation. I believe it may be secondary to his thought disorder since we know that in people who do have chronic thought disorders that the thought disorder itself may either be caused by or may result in some damage to the

brain. For example, schizophrenics very often have enlarged ventricles of the brain.

Q: I notice that you did not attempt to administer an MMPI to Mr. Thompson. The reason for that, sir?

A: In the regular course of my neuropsychological evaluations, I tend not to administer a personality questionnaire. I leave that for, or the assessment of personality, specifically to a clinical psychologist or a psychiatrist.

Q: In this case, this would be something that you would defer basically to Dr. Sultan?

A: I would defer in terms of administering or interpreting of the personality testing. Yes.

Q: Would an MMPI-2 be useful in terms of assessing organic brain damage?

A: No, not necessarily. No.

. . . .

A: No. If I thought it was necessary to form a neuropsychological opinion, I would have given it.

Q: And in this case you didn't?

A: That is correct.

Q: And part of that is because you are not interested in determining whether or not he can distinguish between right and wrong?

A: I was asked to assess his neuropsychological status, and that to [sic] extent, I wasn't asked to consider issues of determining right

or wrong, sanity, and I wasn't asked specifically to consider personality. But when I looked at him, it was clear to me that Mr. Thompson also had personality problems. He had a thought disturbance.

I assumed that someone else would be looking at him in terms of those thought disturbances, the personality difficulties, *and I just recently learned that Dr. Sultan had looked at him.*

(Emphasis added.) Dr. Crown stated that he had worked with Dr. Sultan on several capital cases.

Counsel for Respondent recapped:

Q: My understanding then is you were solely asked to talk about Mr. Thompson's current competency. That's what you have been asked to render an opinion about – or competency at the time you saw him?

A: Competency and mental status.

Q: In terms of competency, did you evaluate him as being competent?

A: At the time that I saw him, it's my opinion he was competent.

(DCTR 91).

In response to Thompson's motion for costs, Respondent reiterated that in his October 30, 1998, initial witness list, Thompson stated that he intended to call two expert witnesses, Dr. Barry Crown and Dr. Faye Sultan. Respondent stated that with regard to the substance of the expert testimony, Petitioner indicated that each would testify in pertinent part that Petitioner's mental condition

substantially impaired his ability to distinguish between right and wrong and/or to conform his conduct to the requirements of law. Respondent contended that on December 24, 1998, Respondent notified Petitioner that he intended to call Dr. Theodore Blau as an expert in the area of forensic neuropsychology to rebut the testimony of Drs. Crown and Sultan. Respondent further claimed that, pursuant to the November 2, 1998 order of the magistrate judge, Respondent conducted the depositions of Dr. Crown and Dr. Sultan on July 20, 1999, and July 22, 1999, respectively.[9] Respondent further contended that, prior to those depositions, Respondent received no information from Petitioner other than that contained in the initial witness list, nor had Respondent been provided with any information concerning the data or other information considered by the witnesses in forming their opinions, as required by Fed. R. Civ. P. 26(a)(2)(B). Finally, Respondent asserted that, although it was clear from Respondent's notice of expert witnesses that Dr. Blau would be called to rebut the testimony of Petitioner's experts, Petitioner chose to schedule the deposition of Dr. Blau on July 15, 1999, before the previously-scheduled depositions of Drs. Crown and Sultan.

c. The District Court's Ruling on the Rule 56 Motion

On February 17, 2000, the district court issued a Memorandum granting Respondent's summary judgment motion as to all claims and dismissing his § 2254 motion. The district court stated in relevant part:

[9] Kissinger defended both depositions.

> *Petitioner claims experts recently obtained by him have revealed that he was incompetent under Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide the proof of these revelations. The Court has read the deposition of Dr. Crown, (Court File No. 119, Exhibit 1) but was unable to located [sic] his opinion that Thompson was incompetent at the time of the crime and throughout his court proceedings. As a matter of fact, Dr. Crown stated he was not asked to render any determination about whether or not Thompson was competent during his state jury trial. (Court File No. 91, Exhibit 1, pp. 7-9). Dr. Crown stated he was only asked to make a competency determination at the time he met Mr. Thompson on June 12, 1998.* After meeting with Thompson for two and a half to three hours, which consisted of taking a brief history for twenty-five to thirty minutes and the remainder of the time was spent administering tests, it was his opinion that Thompson was competent on June 12, 1998. (Court File No. 91, Exhibit 1, p. 7-47).
>
> Dr. Crown did testify Thompson had a significant auditory processing deficit which means he is easily distracted by external auditory stimuli. (Court File No. 91, Exhibit 1, p. 20). He further testified that some of the test results led him to conclude that there was some sort of organic brain damage. However, he is not able to make any assessment of the severity of the damage nor does he intend to make such an evaluation. (Court File No. 91, Exhibit 1, pp. 24-28). Dr. Crown believes this organicity is secondary to a thought disorder which he refers to as a schizoaffective disorder-bipolar subtype with organic

components. Dr. Crown bases his conclusion on the reports of the people who have treated Thompson for the last fourteen years. (Court File 91, Exhibit 1, p. 35).

Respondent hired Dr. Blau to rebut Dr. Crown's testimony. Portions of Dr. Blau's testimony have been filed with the Court. Dr. Blau testified he did not observe or see any indications of organic brain damage on the test he administered. Dr. Blau found Thompson's responses during testing were rational and appropriate. (Court File No. 89, Attachment C, pp. 31, 47-48).

Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. . . . Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.

Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial. Additionally, the record shows that trial counsel did reasonably investigate Thompson's background and mental health history.

Memorandum dated February 17, 2000 at 53-55 (emphases added) (DCTR 124).

d. The Motion to Alter or Amend

On March 2, 2000, Petitioner filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. By way of introduction, the motion states:

> As an initial point, undersigned counsel apologizes for any lack of clarity which may exist in Petitioner's pleadings.1 Though counsel disagrees with the Court's criticism of those pleadings, the fact that the Court's Decision is contrary to controlling authority and sound legal reasoning provides empirical evidence that undersigned counsel has somehow failed to bring that authority and reasoning to the Court's attention. Mr. Thompson should not suffer because of counsel's shortcomings. Furthermore, this Court should not face almost certain reversal simply because counsel phrased otherwise irrefutable arguments in such a way that the Court remained unaware of the proper resolution of Respondent's Motion for Summary Judgment. In an effort to fulfill his duty to both his client and the Court, counsel now attempts to phrase those arguments in such a way that the Court is fully aware of their nature and asks this Court to alter or amend the judgment entered herein to fully address such arguments and thereafter deny Respondent's Motion for Summary Judgement.2

1 The Court's Decision contains several negative comments regarding perceived deficiencies in undersigned counsel's pleadings.

2 Though Mr. Thompson does not waive or concede any of the issues and/or arguments raised by the pleadings which were not expressly or previously waived or conceded, and the same are reasserted herein, Petitioner's Motion to

> Alter or Amend centers on two primary issues: (1) whether the procedural bar which was, *or would be,* applied to claims arising from facts not heretofore presented to the state courts of Tennessee is independent of federal law; and (2) whether the State of Tennessee's interference with Mr. Thompson's attempts to present claims arising from his *unquestionably* severe mental illness *either* deprived Mr. Thompson of a full and fair opportunity to present the facts supporting those claims to the state courts of Tennessee *or* provided "cause" for not presenting the facts supporting those claims to the state courts of Tennessee.

(DCTR 126, at 1-2). Thompson then presented argument on two issues, namely, that "The Tennessee Courts Will Not Apply the Tennessee State Post-Conviction Statute of Limitations to Petitioner's 'Later-arising' Claims in a Manner that is Independent of Federal Law," and that "The Tennessee Court's Refusal To Afford Petitioner Mental Health Services During State Post-conviction Proceedings Constituted a State Obstacle to the Presentation of Facts And/Or Claims Arising From Mr. Thompson's Mental Illness." In conclusion, Thompson reiterated that although the motion to alter or amend did not specifically address every error in the district court's decision, which he specifically reasserted, "[t]he errors addressed herein, however, go to the very integrity of the judicial process." (DCTR 126 at 10). The motion was signed by Stephen M. Kissinger.

e. The District Court's Ruling on the Motion to Amend

On March 31, 2000, the district court denied the motion, holding that Thompson had failed to present any additional information which justified reconsideration and an order altering or amending judgment. (DCTR 128).

On April 21, 2000, Thompson filed his notice of appeal to this Court.

f. The Rule 60(b) Motion

On March 2, 2001, Thompson, through undersigned appellate habeas counsel, Dana C. Hansen, also of the Federal Defenders Office of Eastern Tennessee, filed a motion under Fed. R. Civ. P. 60(b).[10] In that motion, Thompson "respectfully request[ed] the Court to relieve Mr. Thompson from the final order entered on February 17, 2000, for the purpose of entering an order to supplement the record with Respondent's deposition of Dr. Faye E. Sultan, Ph.D, and the accompanying report of Dr. Sultan." (DCTR 133, at 1). Thompson claimed that the petition was timely. "The order entered in Mr. Thompson's case granting summary dismissal of his amended petition for writ of habeas corpus was entered on February 17, 2000. Therefore this motion, being filed within one year of the order, is timely." (*Id.*)

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[10] On March 2, 2001, Hansen filed with this Court a motion to hold case in abeyance pending Thompson's contemporaneous Rule 60(b) motion in the district court. Dr. Sultan's deposition is attached to that motion. We denied that request by order dated March 21, 2001.

Thompson explained "Dr. Sultan's Involvement in this Case:"

> Earlier in Mr. Thompson's District Court proceedings, Respondent took the deposition of Dr. Sultan. The district court record presently contains a summary of her conclusions in an expert disclosures pleading (R. 19) and an affidavit detailing her opinion regarding Mr. Thompson's mental health status in February 1999 (R. 34). Having examined Mr. Thompson and viewed his social and medical history, Dr. Sultan executed a report in addition to her testimony at Respondent's deposition. (Attachments A & B).
>
> Although this Court denied Mr. Thompson's mental health related claims partially on procedural grounds, Dr. Sultan's deposition and report are important to the merits of the claims. With regards to the merits of Mr. Thompson's mental health related claims, he maintains that he made a sufficient showing of a genuine issue of material fact to overcome Respondent's summary judgment motion notwithstanding Dr. Sultan's opinions. However, Dr. Sultan's opinions certainly are directly relevant to the mental health related claims and should be considered by the Court. *Counsel for M Thompson engaged in* [sic] *Dr. Sultan's services for the sole purpose of offering her opinions to support his constitutional claims.* The failure of counsel to ensure that Dr. Sultan's opinions were filed in the record is a result of excusable neglect.

(*Id.* at 2) (emphasis added).

In support of his claim that Dr. Sultan's deposition and report were not included in the record because of

mistake, inadvertence, surprise, or excusable neglect, Thompson stated the following:

> District Court counsel for Mr. Thompson, Stephen M. Kissinger, was under the mistaken belief that the evidence was in the record.1 To the extent that counsel should have nonetheless known that Respondent had not placed Dr. Sultan's deposition and report in the record, counsel's failure to ascertain that fact and file the same himself was the result of excusable neglect. During the time period in question, counsel's office was in a state of turmoil and his caseload was excessively burdensome.
>
> As described fully in the attached affidavit of counsel, Stephen M. Kissinger, this state of disorder contributed to counsel's excusably negligent failure to realize that Dr. Sultan's deposition and report were not filed in the record. (Attachment C).
>
> 1. Respondent's deposition of Dr. Crown and the accompanying report were placed in the record by Respondent. (R. 91). Because Respondent had moved for costs incurred in, *inter alia*, hiring its own mental health expert, Dr. Blau, on the grounds that Dr. Blau's services were unnecessary because Petitioner had no expert opinions to support the mental health related allegations contained in the petition, *counsel for Mr. Thompson was under the mistaken belief that Respondent had placed his deposition of Dr. Sultan and the report which Dr. Sultan had supplied to Respondent in the record.*

(*Id.* at 3) (emphasis added). Thompson therefore asked the Court to order the record supplemented with the deposition and report of Dr. Faye E. Sultan, PhD, and that the

district court revisit its previous summary denial of Thompson's petition. (*Id.*)

(i). Dr. Sultan's Report

Attached to the motion are three exhibits. The first is a psychological report prepared by Dr. Sultan, dated July 22, 1999. Dr. Sultan states the referral questions as follows:

> 1. Mr. Thompson's current psychological status[.]
> 2. *Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.*
> 3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have [to] be considered to be mitigating in nature at the time of his trial.

(DCTR 133, Attachment A; emphasis added).

Dr. Sultan's report indicated that she began psychological evaluation of Thompson on August 20, 1998. At the first session, which lasted four hours, Dr. Sultan conducted a clinical interview and administered the MMPI-2. Dr. Sultan also noted that she did not assess Thompson's levels of current intellectual and neuropsychological functioning because they had recently been assessed by Dr. Crown.

Thereafter, Dr. Sultan initiated "a very extensive review of legal, military, medical, prison and psychiatric/psychological records." Regarding "Relevant Psychological/Psychiatric Data Contained in Records," Dr. Sultan stated:

> The [sic] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self destructive behavior.

(*Id.*)

Next, Dr. Sultan stated that she interviewed five individuals "who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson." Dr. Sultan interviewed Ms. Maybelle Lamar, Thompson's maternal grandmother. Dr. Sultan reported that Lamar assumed complete responsibility for Thompson and his two older siblings after Thompson's mother was killed when Thompson was five years old. Dr. Sultan reported Lamar's description of Thompson as follows:

> Ms. Lamar described Mr. Thompson as displaying significantly "different" behavior when he returned to visit her following his discharge from the U.S. Navy. "Greg didn't act the same".

> Unlike the 'eager to please', passive, sometimes funny gentle boy who she had reared, Mr. Thompson was "angry", "sometimes sad". "I don't think he wanted me to know what was going on with him. He mostly just stayed away from me." Ms. Lamar reported that she noticed Mr. Thompson sometimes "staring off into space" or "talking to himself". She would ask him about these behavior. [sic] "He'd deny it. He acted like he didn't know what I was talking about." Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked questions at any time before or during Mr. Thompson's trial.

(DCTR 133 Attachment A).

Dr. Sultan also interviewed Ms. Nora Jean Hall Wharton, Thompson's older sister. Dr. Sultan reported:

> Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg

> Thompson frequently witnessed his sister Nora being beaten by their grandmother.
>
> Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.
>
> Of particular relevance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg "You have the Devil in you." Mr. Thompson would tell his sister that he was attempting to "knock the Devil out" of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.
>
> Ms. Wharton reported that Greg would frequently cry at school during the early school years, and as a result, was often the victim of intense mockery from his classmates. Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.
>
> Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a lengthy period of time, would appear as if he

might or actually become physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and anti-depressant medications. She reported her younger half-sister Kim has also suffered from significant mental illness.

(DCTR 133 Attachment A).

Dr. Sultan also relayed the report of Michael Chavis, an investigator for the Federal Defenders Office of Eastern Tennessee, from his interview of Ms. Cajulao in summer of 1998.

> Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions proved [sic] by Ms. Nora Wharton, Ms. Cajulao reported several episodes of "paranoid" and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were "after" him. He would close all the curtains in the house because he did not want the person who was "looking" for him to see him through the curtains. She remembers being

> quite concerned about Mr. Thompson's mental state.

Dr. Sultan next reported her "Summary and Conclusions," which we quote here in full:

> Mr. Gregory Thompson has experienced symptoms of a major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.
>
> *It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.*
>
> Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There

are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

Id. (emphases added). Again, this report is dated July 22, 1999.[11]

(ii). Dr. Sultan's Deposition Testimony

The second attachment is Dr. Sultan's deposition. Pruden, counsel for Respondent, took Dr. Sultan's deposition on July 22, 1999. Appearing on behalf of Thompson was Stephen Kissinger. Michael Chavis was also present.

Dr. Sultan told Respondent that she was first contacted by Chavis on behalf of Kissinger in July or August of 1998. Dr. Sultan testified that

A. Mr. Chavis asked me about my availability *and asked if I would be willing to perform a psychological evaluation to assess what Mr. Thompson's psychological condition might have been like at the time of the offense in 1985, to assess whether it was possible to make such an appraisal, to see whether there were factors in his personal background that might have been investigated at the time of trial that would have had bearing on his psychological status at the time of the*

[11] The documents to which Dr. Sultan refers are not actually attached to the report. They are attached to her deposition testimony, Attachment B, and marked as Exhibit 3 to that deposition.

offense, and Mr. Chavis also suggested that they wanted to know something about Mr. Thompson's current psychological state, his level of functioning at the present time.

Q: Were you also asked if you would be able to determine his competency at the time of his criminal trial in 1985?

A: That was not an initial question, no.

. . . .

Q: Did Mr. Chavis express to you any opinion as to what he thought Mr. Thompson's psychological condition was, his mental status was, at the time of the offense?

A: The only opinion that he expressed to me was that he thought that he was not in good shape, that he had deteriorated. He didn't label it in any particular way. Said he didn't think that he was doing as well.

(Emphasis added.) (DCTR 133 Attachment B).

Dr. Sultan also stated that she had consulted with Dr. Crown. She stated that Chavis told her Dr. Crown would be conducting the neuropsychological and intellectual assessment. Dr. Sultan testified that she needed to check Dr. Crown's test results so that she could include them in her opinion, but that she did not provide Dr. Crown with any of her diagnostic information.

When asked whether she had prepared a social history on Thompson, Dr. Sultan indicated that she had not yet but that it had been provided as part of the prison records. Dr. Sultan testified that she had spoken with Thompson's grandmother and sister, and had attempted to

speak with his brother Curtis. She further stated that, although she had not spoken with any of Thompson's school teachers, school administrators, or neighbors, she had reviewed testimony from them. Dr. Sultan was not sure whether she had reviewed the actual transcript from Thompson's court martial, but stated that, at a minimum, she had reviewed the testimony of at least some of the witnesses. She had not contacted any of Thompson's supervisors in the military.

Although Dr. Sultan also had not spoken with Cajulao, she interviewed Chavis, who spent several days with Cajulao in 1998. Dr. Sultan stated that she found Cajulao's observations "beneficial" in reaching her diagnosis. Specifically,

> A: Ms. Cajulao described to Mr. Chavis that during the course of the four-year relationship she had with Mr. Thompson, Mr. Thompson became increasingly bizarre in behavior that he exhibited. There were a number of occasions in which there were incidents that took place in the military that he described to her as him having been attacked. The facts of the situation may in fact not be that, but that was his description to her, that he was being picked on, that he was being bullied, that he was being attacked.
>
> He became depressed, according to her, over time and increasingly paranoid. At some point she would come home from work, and he would be in their home with the curtains drawn, standing by himself in the dark telling her that people were after him and that he didn't want people to be

> able to look at him through the windows. She remembers being quite concerned about his behavior.
>
> There are a couple of situations that she described to Mr. Chavis in which, with no external provocation that she could identify, Mr. Thompson became quite violent with her, and she saw those behaviors as very unusual for him and reported to Mr. Chavis that Mr. Thompson seemed unaware of what had provoked it and didn't even seem after the fact to remember what had taken place, would simply, after a period of time, calm himself down and return to normal behavior. I found all of that quite significant.

(*Id.* at 55-56).

Shortly thereafter, Pruden called for a break, and took that opportunity to take a look at Dr. Sultan's report. Upon return, Pruden asked Dr. Sultan:

> Q: What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?
>
> A: During my interview with Mr. Thompson's sister – and let me say all of her names – Ms. Nora Jean Hall Wharton, Ms. Wharton spontaneously began to talk to me about Mr. Thompson's behavior in the time period immediately following their mother's death.
>
> By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally

abusive in the following fashion: She would yell at him – you have the devil in you, boy. She would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking it as was very odd.

One of things that we know about people who develop thought disorders is that frequently in childhood you'll see one or more peculiarities in behavior. This would certainly fit in that category. She recalls other instances.

Q: Sort of self-punishment or a self-exorcism type thing?

A: A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript.

She told me much more detail about actually the extent of those kind of emotional outbursts.

At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the time, and Nora Wharton was not really permitted much interaction outside of their home.

(*Id.* at 60).

Dr. Sultan further testified that:

She [Ms. Wharton] recalled another episode during which her biological father was brutally beating and raping their mother on the floor in front of them when the children were quite small, perhaps Mr. Thompson was himself three or four. She was maybe four or five. Mr. Thompson's reaction to that was to stand and scream and scream and scream and scream during the entire episode. Any of the – taking the self-injury aside, setting that aside, any one of those behaviors in isolation might not be particularly significant. Putting them together, we begin to see a pattern of intense emotional reactivity.

Q: So basically, if I understand it, it's the self-injurious behavior and the crying and the way you see him reacting to these physical abuses of others?

A: Yes.

Q: And that is indicative of a sign of mental illness to you? I just want to make sure that I'm understanding what you're telling me. If I'm not, please explain it to me.

A: I think I understand your question. It is an early indicator of a problem that's likely to develop. With the benefit of hindsight, it takes on the significance of a precursor, because then we see the escalating pattern of dysfunction and abnormality.

Q: Sort of a causal relationship is what you're seeing developing?

A: I'm not sure what causes what. There are often early indices of later mental illnesses that you don't know exactly what it's going to look like later, but you realize in looking at the child that there's a high likelihood that something is not going to be right when that person achieves maturity.

Q: Because of the environment, for example, in which he's growing up?

A: Perhaps. Perhaps because of the genetics involved. Perhaps because of the situations he's exposed to, as you said, the environment. Perhaps because of whatever factors there are. Perhaps nutrition plays a role in this. These children were without food for significant periods of time as well. I don't know all of the reasons, but what I know is that if you look back in the childhood of this man, the beginnings of mental illness are apparent.

Q: Besides Ms. Wharton's report of lack of food, have you seen any evidence that the children were taken away because of malnutrition?

A: No. Ms. Wharton did tell me, however, that there was a neighbor who had planned to make a report to Social Services, so perhaps I'll have the opportunity to interview that neighbor as well.

Q: . . . You don't know to what degree the children were malnourished then?

A: No. I don't know. I do know that – and this is confirmed by the grandmother – in the six weeks approximately following their mother's death, the children were left alone virtually all of the time because Ms. Lamar was drunk and in bed, and so we have a five, a six, and a seven-year-old child in a house with no food. They would occasionally steal money from underneath her mattress while she was sleeping, and one of them would go to the store to try to find some food. Occasionally a neighbor would provide them with a meal or a can of food. I don't know whether they were malnourished over an extended period of time. I do know that there is, from Ms. Wharton's perspective, rather serious psychological damage from that time.

Q: You have no medical documentation showing any malnourished condition or that it's caused some problem with his brain, do you?

A: I don't. These children were never taken to the doctor, so there wouldn't be any medical

documentation. There's probably documentation in the school system. According to Ms. Wharton, Ms. Lamar was so drunk at the beginning of the school year following their mother's death that she forgot to sign the children up for lunches at school. They didn't have anything to eat during the day, so they forged her signature on a permission slip so that they could eat. They were discovered and punished by the school superintendent people, and a form was sent home to Ms. Lamar. She then signed it, and the children were able to eat lunch after that point. A couple weeks passed for all of that to get straightened out.

Ms. Wharton has undergone a lot of therapy in recent years and says that she's now able to describe situations that she wasn't very comfortable acknowledging to herself, these being one of them.

Q: Your diagnosis of Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

A: What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is

manifested in persecutory ideas, delusions of grandeur – lots of different kinds of delusions actually – auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

The psychological testing early on in Mr. Thompson's incarceration confirm the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

Q: You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

A: Well, it's interesting, because the state Court of Appeals actually notes this, that prior to his entry into the military Mr. Thompson is described almost uniformly – well, in fact, uniformly according to their opinion – as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

At some point – and we don't know, because I haven't seen any psychiatric records from the military at this point; I don't know if

there are any – we don't know whether or not the change in Mr. Thompson is perceived as other than behavioral disruption, but, in fact, his description of that time is that he began to notice that people were trying to hurt him all the time, that officers and other people of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

Q: This is what he related to you during your interview last August?

A: Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, "different." Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said

that was very different from the boy who left her to go into service.

The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her to approach her grandmother about what to do for treatment for him.

(*Id.* at 62).

Pruden then asked:

Q: You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

A: There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

Q: So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

A: Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

Q: Meaning?

A: Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't.

(*Id.* at 69).

The deposition concluded shortly thereafter.

(iii). Kissinger's Affidavit

The third attachment is Kissinger's affidavit. In it, he explains in relevant part the following:

> 2. I was appointed to represent the Appellant, Gregory Thompson, on January 29, 1998, by the district court.
>
> 3. In approximately November of 1999, Ms. Leah Prewitt, the Federal Defender for the Eastern District of Tennessee, was forced by illness to cease activities on behalf of Federal Defender Services of Eastern Tennessee, Inc. Ms. Prewitt's duties were assumed by Ms. Elizabeth Ford, an

> Assistant Federal Defender in the office. Because Ms. Prewitt had not resigned, Federal Defender Services of Eastern Tennessee, Inc., was not able to hire a permanent replacement for Ms. Prewitt. Because Ms. Ford could not do both Ms. Prewitt's job and her own, Federal Defender Services of Eastern Tennessee, Inc. assigned a portion of Ms. Ford's caseload to affiant.
>
> 4. Affiant, however, already had an extremely heavy capital habeas corpus caseload, including, but not limited to, Mr. Thompson's case. In fact, his capital caseload was so heavy that Federal Defender Services of Eastern Tennessee, Inc. was forced to hire a second attorney to handle capital habeas corpus cases in July of 2000. When a portion of Ms. Ford's cases were assigned to affiant, that caseload became so great that affiant made errors which, however understandable, were nonetheless errors.
>
> 5. *Despite the affiant's efforts, there were occasions when he made assumptions, such as the assumption he made regarding Respondent's filing of the report and deposition of Dr. Sultan, which were, however reasonable, incorrect. Counsel's failure to verify this assumption regarding these documents was neglect. Given the extraordinary pressure under which counsel was operating at that time, such neglect was excusable.*
>
> And further this affiant saith not.

(*Id.* Attachment C) (emphasis added). Kissinger's affidavit is dated March 1, 2001.

g. The District Court's Ruling on the Rule 60(b) Motion

On April 17, 2001, the district court denied Thompson's motion to reconsider the order denying his motion to alter or amend judgment pursuant to Fed. R. Civ. P. 60(b). First, the district court held that it had previously determined the Rule 60(b) motion was filed outside the one year time period. The district court noted that, according to its calculation the motion was required to be filed no later than February 16, 2001, to be considered timely. DCTR 139 (citing Fed. R. Civ. P. 6 and 60(b)). The district court then noted that:

> Thompson now argues, without citing authority, that the calculation of the Rule 60(b) one-year limitation period should not begin until March 31, 2000, the date this Court denied his Rule 59 motion to alter or amend the judgment. Thompson's interpretation is contrary to the plain language of the rule. Thompson has not cited, nor has the Court found, any authority to support his position. The rule specifies that the motion should be made within a reasonable time, and in this case "not more than one year after the judgment, order, or proceeding was entered or taken." Rule 60(b) of the Federal Rules of Civil Procedure. In the case before this Court, the order dismissing the *habeas* petition was entered on February 17, 2000. [Court File No. 125].

(*Id.* at 3).

Next, the district court stated, and we quote in full, the following:

> Moreover, the Court specifically noted in its memorandum opinion dismissing the *habeas* petition, that Thompson procedurally defaulted his claim that he was incompetent at the time of the crime and an [sic] the time of trial. [Court File No. 124, at 35]. ***Furthermore, when addressing Thompson's claim of ineffective assistance of counsel for failing to adequately investigate his mental health, the Court placed Thompson on notice that he failed to provide evidence of his allegations that he was incompetent at the time of the crime and trial.*** [Court File No. 124, at 53].
>
> > Petitioner claims experts recently obtained by him have revealed that he was incompetent under Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide proof of these revelations. The Court has read the deposition of Dr. Crown, (Court File No. 119, Exhibit 1) but was unable to located [sic] his opinion that Thompson was incompetent at the time of the crime and throughout his court proceedings. As a matter of fact, Dr. Crown stated he was not asked to render any determination about whether or not Thompson was competent during his state trial.
>
> *Id.* Thus, the filing of this request more than one year after Thompson was placed on notice that such information was not in the record is unreasonable and not excusable neglect.

(*Id.* at 3-4) (bold and underlining added).

2. Appeal to this Court

Thompson did not appeal from the order of the district court's denying his motion to alter or amend judgment. On appeal to this Court, Thompson articulated the issues for review as follows:

> I. Whether the district court erred when it reviewed Mr. Thompson's claims under the "all reasonable jurists" standard denounced by the Supreme Court in (*Terry*) *Williams v. Taylor* to summarily deny Mr. Thompson's petition.
>
> II. Whether the district court erred in denying Mr. Thompson's habeas petition without a hearing where Mr. Thompson did not fail to develop the factual basis of his claims in state court and whether the district court erred by making factual findings without affording Mr. Thompson the opportunity to present evidence with regards to those findings.
>
> III. Whether Mr. Thompson received ineffective assistance of counsel in both the guilt and sentencing phases of his capital trial where counsel failed to investigate and present evidence regarding Mr. Thompson's mental illness and social history and failed to present evidence in support of a life sentence in violation of due process and the Sixth Amendment.
>
> IV. Whether Mr. Thompson's Fifth, Sixth, Eight, and Fourteenth Amendment rights were violated when the state withheld exculpatory evidence which clearly supported Mr. Thompson's claim of serious mental

> illness and its debilitating effects and presented false evidence regarding Mr. Thompson's mental health during trial and post-conviction proceedings.

Curiously, appellate habeas counsel Dana Hansen did not appeal the denial of the Rule 60(b) motion, despite her apparent realization that Dr. Sultan's deposition testimony and report were never made part of the district court record.

III. Discussion

A. Procedural Posture

This case is governed by the Anterrorism and Effective Death Penalty Act of 1996, and we have already ruled on the initial habeas petition. *See Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 804 (2003). However, as alluded to above, this matter is before us in a unique procedural posture, on our own motion, and prior to the issuance of the mandate.[12] Thus, we are not obliged to satisfy the requirements for the filing of a second or successive petition outlined in 28 U.S.C. § 2244. *See Workman v. Bell*, 227 F.3d 331, 334 (6th Cir. 2000) (en banc; equally divided court) (stating that "[a]s a general

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[12] On July 26, 2002, Respondent-Appellee, Ricky Bell, filed a motion for reconsideration of our order filed July 26, 2002, granting Petitioner's *ex parte* motion for authorization to expand the appointment of counsel to include state court proceedings. That motion has not yet been ruled on.

Furthermore, our docket sheet reflects that, on March 14, 2003, Dana C. Hansen filed a motion to stay the mandate, and that we granted it on March 24, 2003. On December 2, 2003, Dana Hansen filed a motion to further stay the mandate, which this Court granted on December 12, 2003.

rule, when a mandate is recalled with respect to a petition for writ of habeas corpus, the petitioner first must satisfy the requirements for the filing of a second or successive petition as outlined in § 2244(b)").

However, even if this matter were before us as a second habeas petition, it would not matter, because the AEDPA does not bar a second or successive petition premised upon fraud upon the court. *See Workman v. Bell,* 245 F.3d 849, 852 (6th Cir. 2001) ("In our equally divided opinion denying further relief for the petitioner . . . , all of the judges agreed that the court can reconsider the petition if there was a fraud upon the court.") *Cf. Calderon v. Thompson,* 523 U.S. 538, 556-57 (1998) (holding that the principles of the AEDPA apply in general to a recall of the mandate because a "State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief;" exempting claims of "fraud upon the court, calling into question the very legitimacy of the judgment"); *Workman,* 227 F.3d at 334 (stating that "[o]ne of the reasons which would justify recalling a mandate is the potential existence of a fraud upon the court"). Indeed, in *Calderon,* the Supreme Court stated that "a mandate may be recalled when it is necessary to address new circumstances before the court which are 'grave' and 'unforeseen' or which are, in other words, unforeseeable circumstances which implicate the justice of the judgment previously rendered." *Workman,* 227 F.3d at 334 n. 3 (citing *Calderon,* 523 U.S. at 549).

B. Ineffective Assistance of Trial Counsel at Mitigation

As the United States Supreme Court recognized in *Strickland,* "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684 (1984). "'[T]he right to counsel is the right to effective assistance of counsel,'" *id.* (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970)), and a defendant can be deprived of that right by counsel's failure to render "'adequate legal assistance.'" *Id.* (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980)).

In *Strickland,* the Supreme Court held that

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

When the duty at issue is the duty to investigate, "counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690; *see also id.* at 688-89. Reasonableness is determined by considering all of the circumstances. *Id.* at 688. However "[p]revailing norms of

practice as reflected in American Bar Association standards and the like," are guides to determining reasonableness. *Id.; see also Hamblin v. Mitchell,* 354 F.3d 482, 486-88 (6th Cir. 2003) (same).

Also relevant to the question of whether the scope of counsel's investigation was reasonable is what counsel *actually* knew. "In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 2538 (2003).

1. Deficient Performance

In our previous opinion we held that trial counsels' investigation was sufficient, principally because Thompson failed to present any evidence indicated that he suffered from symptoms of mental illness at the time of the offense. *See Thompson,* 315 F.3d at 589. In other words, we could not have found ineffective assistance because there was no showing that trial counsel missed available evidence, and we were mislead by incomplete records.

According to Dr. Sultan's July 1999 testimony, Thompson was suffering from a serious mental illness at the time of the offense.[13] Moreover, "all of the information

[13] Schizophrenia is a chronic disorder of thought, characterized by delusions, hallucinations, disorganized speech or grossly disorganized orientation or catatonic behaviors. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders pp. (rev. 4th ed. 2000) ("DSM-IV"). There is no definite laboratory or radiological test that establishes the diagnosis of schizophrenia, rather, the diagnosis is based on longitudinal historical information. As individuals

(Continued on following page)

related to Mr. Thompson's early mental illness and social history [and] was available at the time of his 1985 trial." Had trial counsel adequately interviewed family members, counsel would have found that Thompson exhibited troubling behaviors from an early age. Thompson engaged in self-injurious behaviors as a young child. As a young adult, and prior to the murder, Thompson had mood swings and episodes during which he acted in a bizarre manner and appeared to lose contact with reality. He talked to himself. At times he became agitated, crying and screaming for no apparent reason. At other times, he appeared paranoid, keeping the drapes closed, fearing that he was being followed. As Dr. Sultan observed, although each instance taken alone might not be sufficient, when combined with Thompson's abnormal responses, they are indicative of an early psychopathology.

As Dr. Blair indicated at the state post-conviction hearing, a complete social and family history is critical to the establishment of a diagnosis of mental illness. *See Thompson,* 315 F.3d at 579. Yet, according to Dr. Blair, MTMHI's records only contained sketchy information related to Thompson's history before he committed the murder. Dr. Copple's testimony indicated that he did not take a thorough history: "I did get a little bit of general information, such as his age, his education." Dr. Copple did not appear to be aware of Thompson's possible symptoms. When asked about Thompson's report of mood

with schizophrenia may not disclose the full extent of their symptoms, an evaluation for the presence or absence of schizophrenia or other psychotic disorders is not complete without a thorough social history obtained from family members or friends who have known the patient over time.

swings, Copple indicated that he did not believe Thompson ever had mood swings or reported them to Dr. Watson.

This readily available social and family history evidence, had trial counsel obtained it, should have been reported to experts for psychiatric evaluation. After all, it was counsel who traveled to Thompson's home town to interview family members and friends and would have had access to the information. Furthermore, the evidence was not subtle, counsel did not need any expertise in psychiatry, as even Thompson's family members were aware of Thompson's need for a psychiatric evaluation.

Trial counsel were also ineffective for failing to obtain and present a comprehensive social history. Thompson was the victim of verbal abuse and neglect of sufficient severity that by first grade Thompson was exhibiting odd behaviors. He repeatedly banged his head in response to his grandmother yelling at him. He wailed in the classroom and received the nickname of "Fire Engine" due to the unusual sound of his sobs. At age three or four, he observed his father brutally beat and rape his mother. His mother died when he was five years old and he was left with his maternal grandmother who was continuously drunk for the first six weeks and did not even provide food for the children. All of this information was powerful mitigating evidence that should have been presented to the trier of fact at sentencing. *See Wiggins v. Smith,* 539 U.S. 510 (2003) (holding that the scope of trial counsel's investigation was unreasonable when counsel failed to investigate the petitioner's social history, including the fact that his mother was a chronic alcoholic and that he was sent to various foster homes, factors which would have led any reasonably competent attorney to pursue); *Williams v. Taylor,* 529 U.S. 362, 395-98 (2000) (finding

ineffective assistance of counsel because counsel failed to investigate and introduce readily available evidence of the petitioner's nightmarish childhood, including severe and repeated beatings by his father, and available evidence showing that the petitioner was borderline mentally retarded; also finding prejudice in that the evidence "might well have influenced the jury's appraisal of his moral culpability"); *Hamblin,* 354 F.3d at 489-91 (holding that defense counsel's representation of the petitioner fell short of prevailing standards because had counsel investigated, they would have found a large body of mitigating evidence of an unstable and deprived childhood, characterized by extreme poverty, neglect, and family violence, as well as signs of a mental disability or disorder); *Coleman v. Mitchell,* 268 F.3d 417, 451-54 (6th Cir. 2001) (finding ineffective assistance at mitigation where counsel failed to present evidence of the petitioner's horrific childhood, his mental and emotional disorders, and low IQ); *Carter v. Bell,* 218 F.3d 581, 600 (6th Cir. 2000) (finding ineffective assistance where counsel failed to present evidence "of a childhood in which abuse, neglect and hunger were normal").

Like trial counsel in *Wiggins,* trial counsel here had more than sufficient leads to investigate further. *Cf. Wiggins,* 123 S. Ct. at 2536-37 (holding that trial counsel's decision not to expand their investigation beyond a presentence investigation report and department of social services records which revealed facts concerning the petitioner's alcoholic mother and his problems in foster care, as well as his self-report of a miserable childhood was unreasonable). Thompson's trial counsel were aware that Thompson had exhibited possible symptoms of a mental illness. Trial counsel filed a notice of insanity

defense and requested that Thompson undergo a mental evaluation. In a letter dated March 29, 1985 to Dr. Taran of Multi-County Mental Health, counsel explained that Thompson was experiencing "extreme mood changes." Counsel also knew of Thompson's violent behaviors in the military, which were in stark contrast to Thompson's previous history. In addition, as described in the report, Thompson described hearing auditory hallucinations "all of his life" when admitted to MTMHI. As counsel testified at the post-conviction evidentiary hearing, "[t]he thing that struck me so strongly throughout this whole case was really to do with that, and that was the difference in the man when he lived in Georgia and grew up there and what kind of person he was as opposed to someone who committed – allegedly committed this act, this murder and that was a tip off that there may have been some kind of brain injury." *Thompson*, 315 F.3d at 577. In short, trial counsel's investigation into Thompson's background did not reflect reasonable professional judgment in light of what they knew and suspected. *Cf. Wiggins*, 123 S. Ct. at 2542 (holding that trial counsel's decision to end their investigation when they did was unreasonable in light of the evidence counsel uncovered in the social service records).

2. Prejudice

The failure to present this mitigating evidence was prejudicial. *Cf. Wiggins*, 123 S. Ct. at 2542 (holding that the petitioner's evidence of severe privation and abuse in his early life while in the custody of his alcoholic mother and physical abuse in subsequent years in foster care prejudiced his defense). As the Supreme Court stated in *Wiggins*, "Petitioner thus had the kind of troubled history we have declared relevant to assessing a defendant's moral

culpability." *Id.* at 2542 (and cases cited therein). Finally, as was true in *Wiggins*, "[h]ad the jury been able to place the petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 2543.

In sum, trial counsels' conduct failed to render effective assistance of counsel guaranteed by the Sixth Amendment by failing to conduct a reasonable investigation of Thompson's social history and present powerful, readily available mitigating evidence, and by failing to pursue known leads that might have helped them to prepare their case in mitigation. In light of Dr. Blair's post-conviction testimony that a full history was needed to determine whether Thompson was schizophrenic at the time of the offense, the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1).

C. Misconduct of Habeas Counsel

The next issue is whether Kissinger may have intentionally, or at a minimum recklessly, failed to timely and properly present critical evidence to the district court and this Court – evidence which, in the words of the district court, might have entitled Thompson to relief. Simply put, the question is this: how and why did habeas counsel fail to timely and properly present Dr. Sultan's expert opinion testimony that "Mr. Thompson was suffering serious mental illness [Schizoaffective Disorder, Bipolar Type] at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform

his conduct to the requirements of law." Psychological Report prepared by Dr. Faye Sultan, dated July 22, 1999.

This matter is somewhat reminiscent of *Demjanjuk v. Petrovsky,* 10 F.3d 338 (6th Cir. 1993).[14] There, on its own motion, this Court vacated the judgment of the district court denying the petitioner's writ of habeas corpus upon finding that the judgments in the underlying extradition proceedings were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court.[15] *Id.* at 356. As in *Demjanjuk,* we must decide if "the conduct outlined herein constitutes fraud on the court or attorney misconduct sufficiently serious to require corrective action on our part." *Id.* at 352.

As we observed in *Demjanjuk,* fraud upon the court "is a somewhat nebulous concept," defined as embracing

> only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

[14] Although *Demjanjuk* involved misconduct by federal prosecutors, I see no reason why defense attorneys should not be held to a similar standard of integrity, especially when defense counsel are federal defenders specializing in habeas and capital cases.

[15] Specifically, we found that attorneys for the Department of Justice Attorneys "acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly" when they withheld exculpatory materials from the petitioner. *Demjanjuk v. Petrovsky,* 10 F.3d 338, 354 (6th Cir. 1993).

Id. (quoting 7 *Moore's Federal Practice and Procedure,* ¶ 60.33). *See also Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 245 (1944) (holding that fraud upon the court generally involves a deliberately planned scheme to subvert the integrity of the judicial process). Cases dealing with fraud on the court usually turn on whether the improper actions involved the parties alone, or whether the attorneys in the case were also involved. *Demjanjuk,* 10 F.3d at 352. As we further observed in *Demjanjuk,* "[a]s an officer of the court, every attorney has a duty to be completely honest in conducting litigation," and that

> while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.

Id. at 352 (quoting 7 James Wm. et al., Moore's Federal Practice ¶ 60.33). Finally, we remarked that "[a]lthough there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court, we agree . . . that a scheme, based on a subjective intent to commit fraud, is not required in a case such as this. Reckless disregard for the truth is sufficient." *Id.* at 352-53 (holding that Department of Justice Attorneys committed fraud on the court by failing to disclose to the courts and to the detainee exculpatory information in their possession).

Demjanjuk defined fraud on the court as consisting of (1) conduct by an officer of the court, (2) directed towards the judicial machinery itself, that is (3) intentionally false,

wilfully blind to the truth or is in reckless disregard for the truth, is (4) a positive averment or concealment when one is under a duty to disclose, and that (5) deceives the court. *Id.* at 348.

The first and second fraud on the court factors appear to be easily met. Thompson's attorneys are clearly officers of the court, *see generally Hickman v. Taylor,* 329 U.S. 495, 510 (1947) (noting that "[h]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients"), and their representation of Thompson in these habeas proceedings was and is clearly directed at the judicial machinery of the court.

The fourth and fifth factors also appear to be present. Habeas counsel for Thompson had an obligation, as part of their duty to represent zealously their client, to present to the court material, critical, *available* evidence, which in this case would virtually have ensured the relief Thompson requested in his federal habeas corpus petition. This meant presenting, by affidavits or otherwise, proof of Thompson's mental illness at the time of the offense in response to Respondent's motion for summary judgment. *See* Fed. R. Civ. P. 56(e) (stating that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party"). *See also* Fed. R. Civ. P. 56(c) (stating that "[t]he judgment sought shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law"). If counsel knew that it had positive, mitigating proof in the form of an expert opinion that Thompson suffered from a mental illness at the time of the offense such that it would have substantially impaired his ability to conform his conduct to the requirements of the law – information that the district court specifically indicated in its discovery order might entitle Thompson to the relief he requested – then that information should have been presented in response to Respondent's motion for summary judgment so as to prevent the grant of summary judgment in Respondent's favor and against Thompson.

Here, both the district court and this Court were deceived. That is, both courts assumed that probative evidence as to Thompson's mental illness at the time of the crime did not exist because counsel failed to present it.[16] Based on the natural assumption that such evidence did not exist because it was not presented at the summary judgment stage, the district court held that

> Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. . . . Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court

[16] This seems to be a pretty natural assumption, given counsel's obligation to zealously represent their client.

> with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.
>
> Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial.

Memorandum Opinion dated February 17, 2000, at 54-55.

This Court labored under the same misimpression that there was no evidence to establish that Thompson suffered from a serious mental disease or defect at the time of the offense:

> Moreover, not one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial. Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stating simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. *Similarly, neither Crown nor Sultan ever expressed an opinion that Thompson was mentally ill at the time of the crime. In fact, Crown stated that he was not asked to render such an opinion. . . . On the other hand, Crown found Thompson competent in June 1998, which is consistent with Copple's findings and the MTMHI evaluation in 1985.*

> *Also, as the district court found, Thompson failed to submit any medical records or proof* ***to any court*** *that he actually sustained the alleged head injuries or that they resulted in any permanent damage. Further, he has never submitted* ***to any court*** *any proof that he suffered from severe mental illness at the time of the crime.*

Thompson, 315 F.3d at 589-90 (emphases added). That is not all we said:

> Counsel has now had numerous opportunities via expert testimony to establish that Thompson suffered from organic brain disease or mental illness at the time of the crime. *And yet, at each opportunity, counsel fails to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime.* In essence, counsel is attempting to rely on, *as proof*, two inferences: 1) because Thompson allegedly suffered head injuries, he must have suffered brain damage, and 2) because he is currently suffering from schizo-affective disorder, he must have been suffering from mental illness at the time of the crime. But inferences are not proof, as even Thompson's experts seem to recognize, for each and every one fails to automatically take the leap from these inferences to the conclusion that he was mentally incompetent at the time of the murder. *However, absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist.* As we held in *Lorraine v. Coyle*, 291 F.3d 416, 436 (6th Cir. 2002), "[i]t simply cannot be said that trial counsel's conduct

> fell below an objective standard of reasonableness under *Strickland* simply because the leads [of possible brain damage] led nowhere."
>
> . . . .
>
> Thompson has not presented any evidence of incompetence at the time of the crime or trial in either the state or federal proceedings. As previously noted, none of Thompson's experts have stepped up to the plate on the key issue of Thompson's competence at the time of trial.

Id. at 590-92 (emphases added).

In short, both the district court and this Court were mislead into believing that significant mitigating evidence of Thompson's mental illness at the time of offense did not exist. It quite clearly did exist, *and that evidence was in habeas counsel's possession,* via Dr. Sultan's July 22, 1999 report and July 22, 1999, deposition, prior to the filing of Thompson's response in opposition to Respondent's motion for summary judgment, which Thompson filed on July 29, 1999 (DCTR 86), and prior to Thompson's filing of Supplemental Brief in Support of Response in Opposition to Respondent's Motion for Summary Judgment, on September 14, 1999.[17] (DCTR 104).

This leaves the third factor. Here the question is whether habeas counsel's conduct in failing to present

[17] In his opposition to Respondent's motion for summary judgment, Thompson asked the court for an order allowing him to file a brief in regard to the issues of exhaustion of state remedies. The district court granted Thompson's request via written order on September 8, 1999, directing Thompson to file his brief no later that Tuesday, September 14, 1999.

available evidence of Thompson's mental illness at the time of the crime was intentionally false, wilfully blind to truth, or in reckless disregard for the truth. In his affidavit attached to Thompson's Rule 60(b) motion, Kissinger states that "an extremely heavy capital habeas corpus caseload, including, but not limited to, Mr. Thompson's case" caused him to make "errors," thereby suggesting that his conduct in this matter was negligent and not intentional or in reckless disregard for the truth.

Our incredulity over this explanation stems from a simple premise: how could counsel possibly forget or overlook *the* critical piece of evidence – i.e., an expert opinion that Thompson suffered from a significant mental disease or defect at the time of the offense – that both trial and habeas counsel purportedly sought for over a decade in both the state and federal courts, and which habeas counsel obtained at the very latest (but obviously much sooner) seven days prior to the filing of Thompson's response to Respondent's dispositive motion?

Virtually *every pleading* in both the state and federal proceedings is directed toward this end. Within two months of the murder, trial counsel requested a mental evaluation of Thompson to determine his mental capacity at the time of the crime. Within three months of the murder, trial counsel filed a supplementary motion for a psychiatric examination and a neurological examination to determine if Thompson was suffering from a mental illness on the date of the offense. Less than three months after the offense, Thompson was referred to the Multi-County Mental Health Center for a forensic evaluation to make that determination, and a week later the trial court entered another order directing Thompson to undergo a forensic evaluation at MTMHI.

Trial counsel were not content with the state's evaluation and requested funds to hire an independent psychiatrist. They ultimately hired Dr. Copple. Dr. Copple examined Thompson principally to see what he would be capable of doing in a prison setting and did not perform a thorough review of Thompson' social history. Amazingly, habeas counsel faulted trial counsel's choice of Copple because he did not conduct a thorough review of Thompson's family history and medical background.

In his petition for post-conviction relief in state court, Thompson claimed that trial counsel failed to adequately investigate his background for the existence of mitigating evidence, and sought to hire a licensed psychologist or psychiatrist and an investigator. Attached to that request was the affidavit of Dr. Gillian Blair, a clinical psychologist, who specifically stated that if Thompson were suffering from a neurological or psychological impairment bipolar affective disorder or schizoaffective disorder, it was likely that some degree of that impairment would have existed at the time of the offense and would have been a significant factor in determining whether Thompson could have conformed his conduct to the requirements of law. Dr. Blair stated that Thompson needed a full psychological evaluation. She testified to the same effect at the state post-conviction hearing. The state post-conviction court denied Thompson funds, however.

On appeal to this Court, habeas counsel asserted that the state post-conviction courts placed Thompson in a Catch-22 situation by denying them the funds needed to obtain the requisite expert opinion and then finding no ineffective assistance because there was no proof in the record that counsel failed to present any available evidence of a mental disease or defect. And habeas counsel

went out and hired a neuropsychologist and a clinical psychologist. Dr. Sultan conducted the very examination and evaluation that Dr. Blair outlined was necessary but could not provide because of lack of funds. Dr. Blair stated that "the most important thing that would be necessary would be a full history and full medical records of Mr. Thompson prior to the commission of the offense." She further indicated that from her limited review, Thompson's social history, his childhood and upbringing were "sketchy."

Dr. Sultan found the "other facts" Dr. Blair indicated would be necessary to develop an opinion as to Thompson's condition at the time of the offense. In her report, Dr. Sultan stated that she "initiated a very extensive review of legal, military, medical, prison, and psychiatric/psychological records." Dr. Sultan also interviewed several individuals who provided significant information about Thompson's childhood and family background, including Thompson's grandmother, older sister, and a girlfriend. These witnesses revealed an abusive, traumatic childhood and clear signs of schizophrenia onset in early adulthood prior to the offense. Based on that review, Dr. Sultan opined that Thompson displayed significant signs of mental illness from the time he was a small child and manifested symptoms of schizo-affective disorder in early adulthood, prior to the 1985 offense.

The principal bases for Thompson's petition and amended petition for writ of habeas corpus were his allegations that trial counsel were ineffective for: (1) failing to perform a reasonable investigation of his background and mental health history; (2) failing to secure adequate expert assistance regarding his mental health; and (3) failing to reasonably investigate and challenge

Thompson's competency at the time of the offense. Thompson also claimed he was denied funding for mental health and investigative experts during the state trial and post-conviction proceedings.

Thompson's initial witness list represented that Dr. Crown would testify that Thompson's brain damage, as well as his medical and social history, are consistent with schizophrenia. The initial witness list further indicated that Dr. Sultan would testify that Thompson suffers from schizophrenia and did so at the time of the offense. Moreover, from the outset habeas counsel represented to the district court, through the pleadings, that Thompson would establish that trial counsel failed to present available mitigating evidence. Indeed, the district court's November 1998 ruling affirming the magistrate judge's November 2, 1998, discovery order explicitly stated that if the facts were developed to show that Thompson's mental health should have been introduced as mitigating evidence, Thompson might be entitled to relief.

Despite the representations in his initial witness list, as Respondent discerned on July 20, 1999, Dr. Crown had no opinion as to Thompson's mental state at the time of the offense. In other words, at the time of Dr. Crown's deposition, eight months after the initial witness list was filed and several days before Thompson's response to the summary judgment was due, Dr. Crown had not been asked to form an opinion on the issue he was purportedly retained to evaluate and the key issue in the case. Dr. Crown's deposition testimony *verifies that habeas counsel never asked him to render an opinion as to Thompson's mental state at the time of the murder.* Furthermore, even though Dr. Crown concluded that Thompson had a schizoaffective disorder, which he acknowledged tends to develop

in late adolescence to early adulthood, and which he further acknowledged appeared to have begun in the last stages of Thompson's military career, Dr. Crown stated that he was not asked, and had not pinpointed, the onset date.

In contrast, in the initial witness list, Petitioner stated that Dr. Crown would testify that he had "been provided with background information regarding Petitioner's medical and social history," and "administered a battery of indicated neuropsychological tests," which would "indicate that Petitioner suffers from organic brain damage." The witness list further represents that Dr. Crown would testify "that the brain damage observed, as well as Petitioner's social and medical history, is consistent with schizophrenia," and that "Petitioner's brain damage substantially impaired the ability of the Petitioner to distinguish between right and wrong and/or to conform his conduct to the requirements of the law." The disparity between Dr. Crown's actual deposition testimony and the witness list is patent.

Less clear is why habeas counsel did not ask Dr. Crown for an opinion on Thompson's mental status at the time of the offense. Habeas counsel's attempt, in response to Respondent's motion for reimbursement of deposition costs, to shift the burden of procuring such an opinion from Dr. Crown to Respondent, is absolutely audacious. Habeas counsel actually argued that Respondent had the burden of procuring that opinion from Dr. Crown. How ironic that habeas counsel would suggest that procuring such expert opinion testimony was somehow the Warden's burden, given that habeas counsel equally faulted defense trial counsel for failing to procure and present same. We have a hard time believing that, on the brink of summary

judgment, habeas counsel somehow got confused over who had the burden in the habeas proceeding of proving ineffective assistance of trial counsel.

More outrageous is Kissinger's representation on behalf of his client in that same response that Dr. Crown's statement substantially conformed to the information contained in the initial witness list because Dr. Crown stated "in passing" in his deposition that Thompson suffers from a bipolar disorder of a self-afflicted type and that the onset of this affliction was prior to the alleged offense. As review of Dr. Crown's deposition testimony makes clear, Dr. Crown stated Thompson has a schizo-affective disorder, which typically occurs in early adulthood, but Dr. Crown also made clear that he was not asked to opine whether Thompson actually manifested symptoms prior to the offense and further stated that he had "no real pinpoint."

Again we cannot escape the irony of Kissinger's assertions in that motion that Respondent either made "a strategic decision" not to procure Dr. Crown's opinion regarding Thompson's mental health at the time of the offense, or that Respondent "forgot to do so."[18]

Most troubling of all, of course, is the presence and substance of Dr. Sultan's testimony. Dr. Sultan conducted the background investigation, interviewed Thompson's

[18] Also disturbing was habeas counsel's parallel motion for reimbursement costs for the deposition of Dr. Blau. Habeas counsel scheduled that deposition prior to the depositions of Drs. Crown and Sultan, knowing full well that all the information Respondent had was what habeas counsel had stated in the initial witness list. Such gamesmanship, on the eve of the due date of Thompson's response to Respondent's motion for summary judgment, is inexcusable.

family members and provided the *exact* diagnosis that habeas counsel claims trial counsel was under a constitutional obligation to discover and present. And she provided the service *at Kissinger's request.* The record reflects that habeas counsel were in communication with Dr. Sultan as early as August 1998. In an affidavit signed on February 10, 1999, attached to Thompson's ex parte motion for a temporary mandatory restraining order, Dr. Sultan alleged that she had reviewed hundreds of pages of records and documents about Thompson's psychiatric, military, and legal history, and had first met with Thompson on August 20, 1998. Kissinger, through Chavis, asked Dr. Sultan for that opinion, received a report with that exact conclusion on July 22, 1999 and heard Dr. Sultan testify to that effect on July 22, 1999. After all, Kissinger was counsel of record for Thompson at Dr. Sultan's deposition. How then could counsel fail to include any mention of Dr. Sultan's expert opinion in Petitioner's response brief to Respondent's motion for summary judgment? It is virtually inconceivable to think that counsel could overlook this information as he was preparing the response to the summary judgment motion. Dr. Sultan's deposition testimony and accompanying report were obtained a *mere seven days before the brief was filed.* How could counsel possibly forget about its best evidence, and in such a short span of time?

Habeas counsel's conduct following the district court's issuance of its opinion granting summary judgment to Respondent seriously undercuts the possibility that habeas counsel's account is believable. On March 2, 2000, two weeks after the district court granted summary judgment to Respondent *in an opinion which explicitly stated that Thompson had failed "to provide this Court with any significant probative evidence that Thompson was*

suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigating evidence," Thompson filed a motion to alter or amend judgment. Habeas counsel claimed that it filed that motion "[i]n an effort to fulfill his duty to both his client and the Court." Yet the motion does not attempt to present the "forgotten" evidence, Dr. Sultan's opinion. Instead, it merely presented two clarifying arguments. Ironically, habeas counsel stated that while not waiving or conceding any of the other arguments previously raised, the motion centered on these two issues because they went "to the very integrity of the judicial process." If counsel's "failure to remember" Dr. Sultan's testimony, after a pointed reminder by the district court that "Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial," is not reckless disregard for the truth, what is?

And habeas counsel apparently continued to forget about Dr. Sultan's opinion. Habeas counsel waited still another year to bring this information forward. And it waited for a year from the district court's denial of Thompson's motion to alter or amend judgment, not one year from the date of the underlying judgment. As the district court pointed out, this motion was untimely, because the plain language of Rule 60(b) sets an absolute time limit on the motion of one year in addition to the requirement that the motion be filed within a reasonable time. Fed. R. Civ. P. 60(b). The district court therefore lacked the authority to grant relief. *See Ackermann v. United States,* 340 U.S. 193, 197 (1950) ("A motion for excusable neglect as provided in Rule 60(b)(1) must, by the rule's terms, be made not more than one year after the judgment was entered.").

Again, we find it curious that habeas counsel's remembrance of depositions past came just a hair too late to fit within the parameters of Rule 60(b).[19]

Then, for the first time, counsel offered to supplement the record with Dr. Sultan's report and deposition testimony upon its enlightened view that "Dr. Sultan's opinions certainly are directly relevant to the mental health related claims," and further acknowledgment that "[c]ounsel for Mr. Thompson engaged in Dr. Sultan's services *for the sole purpose of offering her opinion to support his constitutional claims.*" Habeas counsel argued excusable neglect based on a heavy caseload and a disorderly office, and further stated that Kissinger "was under the mistaken belief" that the evidence was in the record. In a footnote, Kissinger further explained his "mistaken belief" as follows: Because Respondent had placed Dr. Crown's deposition testimony and accompanying report in the record, as part of its motion for reimbursement costs, and because Respondent had moved for costs in hiring its own mental health expert, Dr. Blau, on the grounds that Blau's services were unnecessary as Petitioner had no experts to support the mental health related issues, Kissinger apparently assumed that *Respondent* would also have included the deposition testimony and report of Thompson's only other mental health expert to bolster its request for deposition costs.

This explanation makes little sense. In the first place, Dr. Sultan's deposition testimony and accompanying report,

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[19] As reflected in its order denying Petitioner's motion to alter or amend judgment, the district court obviously sensed that something was amiss, but its hands were tied by counsel's strategic choice to file an untimely Rule 60(b)(1) motion.

unlike Dr. Crown's, do support the mental health related allegations and is consistent with the witness list statement. More importantly, Kissinger's explanation seeks to obscure the fundamental fact that Thompson's habeas counsel had an independent responsibility to both Thompson and the court to present Dr. Sultan's opinion in Thompson's opposition to Respondent's motion for summary judgment, and ultimately, to meet Thompson's burden of establishing that he was entitled to the requested relief, a grant of the writ of habeas corpus based on constitutional error. Kissinger's attempt to shift the "blame" to Respondent is *in*excusable.

Furthermore, habeas counsel's filing of an obviously untimely Rule 60(b) motion can be conceived of as "a fraud perpetrated . . . so that judicial machinery cannot perform in the usual manner." That is precisely what happened in this case. The district court was prevented from administering full justice because it lacked all of the vital information necessary to afford the proper relief.

As exhaustively detailed above, the essence of Thompson's claim *throughout the entire course of the state and federal proceedings* was that he was suffering from a mental disease or defect at the time of the offense. Habeas counsel *criticized trial counsel for failing to procure this evidence,* and was aware from the outset how it needed to establish ineffective assistance of trial counsel at mitigation, as reflected by its early decision to retain Drs. Crown and Sultan. Habeas counsel then did exactly what it faulted trial counsel for failing to do.[20] That is, habeas

[20] Trial counsel cannot be faulted for relying on the evaluation of a credentialed expert which was entirely consistent with the evaluation of an inpatient psychiatric team specializing in forensics that also

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counsel conducted the investigation that it alleged trial counsel were constitutionally ineffective for failing to perform. That investigation revealed that Thompson was suffering from a serious mental illness at the time of Brenda Lane's murder. It also revealed significant aspects of Thompson's social history long recognized as mitigating in other capital cases. This Court simply cannot, at this juncture, accept counsel's explanation that it forgot to remember that critical evidence until slightly one year after judgment. There appears to be no acceptable excuse for habeas counsel's behavior.[21]

concluded Thompson was not mentally ill. Nonetheless, as previously discussed, trial counsel's failure to investigate and present Thompson's social history provides an independent basis for finding ineffective assistance of counsel at mitigation under *Wiggins*.

[21] We can only assume that habeas counsel planned to unveil Dr. Sultan's opinion on the eve of Thompson's execution. Judge Moore differs, concluding that "more than likely, a genuine mistake was made, one which was not realized until a different attorney looked at the case. To conclude otherwise is to disbelieve sworn testimony by an officer of the court, and to assume that habeas counsel conspired to conceal evidence beneficial to their client, for no discernible reason."

Once again, if one reminisces, the capital case of *Byrd v. Collins,* 209 F.3d 486 (6th Cir. 2000), *cert. denied,* 531 U.S. 1082 (2001) (first habeas petition), and *In re Byrd,* 269 F.3d 544 (6th Cir. 2001) (successive petition) comes quickly to mind. There, habeas counsel sat for twelve years on an affidavit by a codefendant that allegedly would have established petitioner Byrd's actual innocence, and did not file their second habeas petition introducing the evidence and "actual innocence" argument until one week before the petitioner's scheduled execution date. On this basis, a majority of the judges in regular active service invoked the inherent equitable powers of the court to stay the petitioner's execution and remand the matter for the development of a factual record. *See In re Byrd,* 269 F.3d 585 (6th Cir. 2001). So there may be a rational, strategic, calculated reason for habeas counsel's purported negligence.

IV. Response to Majority Opinion

The majority opinion agrees that Dr. Sultan's opinion requires us to vacate the district court's grant of summary judgment in favor of respondent. However, it posits that my opinion "goes too far in its accusations of fraud on the court;" on the grounds that "while his [my] explanation for the omission of the Sultan deposition from the official record before the court is possible in the narrowest sense, the power of this court should not be used to make such accusations without more definite proof than the factual record of this case reveals." Rather, the majority would find that the more plausible explanation is that "a genuine mistake was made, one which was not realized until a different attorney looked at the case," and that "[t]o conclude otherwise is to disbelieve sworn testimony by an officer of the court."

The majority opinion correctly recognizes that, at this juncture, I am inclined to disbelieve Kissinger's representations of excusable neglect because I find it utterly implausible that counsel could forget about his most important piece of evidence, expert testimony assessing Thompson's mental state at the time of the crime, given that his principal strategy throughout the habeas proceedings was to claim Sixth Amendment ineffective assistance of counsel based on trial counsel's failure to obtain that very evidence. From day one, habeas counsel knew that in order to make a successful constitutional challenge, he had to acquire an expert opinion to the effect that Thompson was suffering from schizophrenia at the time of the offense, as reflected by the fact that counsel hired two experts who would purportedly say that. Furthermore, even assuming short-term memory loss due to a crushing workload, Kissinger sat through Dr. Sultan's deposition a

mere seven days before he signed and filed the response to the summary judgment motion. On the eve of its filing, how could he, how did he, forget what Dr. Sultan said, and utterly fail to make the slightest allusion to her expert opinion – especially since she provided precisely what he needed to support his ineffective assistance claim?

Even assuming that Kissinger innocently suffered from virtual amnesia during this critical phase of the federal district court proceedings, and appellate habeas counsel Dana Hansen caught the error when she took over the appeal and tried to correct it, why then did she fail to appeal the district court's denial of the Rule 60(b) motion or otherwise seek to supplement the record on appeal under Fed. R. App. 10(e) given the obvious importance of that testimony and the gravity of the situation before us?[22]

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[22] I am also troubled by the fact that in Thompson's petition for writ of certiorari, signed by Dana C. Hansen Chavis, as counsel of record for Petitioner, Hansen refers to Dr. Sultan's opinion regarding Thompson's *as if it were properly presented to the district court and made part of the record.* In that brief, Hansen Chavis represents as follows:

> Thompson's habeas corpus alleged ineffective assistance of trial counsel via the failure to adequately investigate and obtain adequate expert assistance regarding Thompson's mental health at the time of the offense and failure to direct an expert inquiry into mental health mitigation and to obtain adequate expert assistance regarding Thompson's mental health at the time of the offense and failure to direct an expert inquiry into mental health mitigation and to obtain rebuttal evidence against the State's psychiatrist. Respondent moved for summary judgment, asserting only that the claims were either procedurally barred or the state court decision was not contrary to or an unreasonable application of federal law (Apx. 442) because Dr. Blair had not offered a final opinion on Thompson's mental health at the time of the offense (which, of course, she was prevented from doing

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by the post-conviction court's denial of funding). Respondent further asserted Thompson was not entitled to present further evidence in support of his claims in a federal court evidentiary hearing. Thompson responded to the summary judgment motion by asserting that he had not failed to develop the factual basis of his claim; instead, the state court had, through the after-the fact application of procedural rules governing the appointment of experts in state post-conviction cases, prevented him from fully developing his claim in state court and that he was therefore entitled to an evidentiary hearing to present further evidence in support of his claims.

When the district court issued its decision granting Respondent's motion for summary judgment, however, it bypassed Respondent's argument as well as Thompson's response and instead held that the claim would be denied because Thompson had failed to present affidavits or other evidence (Apx. 711). The district court never provided Thompson with notice of its intention to rely on this ground nor did it provide him with an opportunity to present such evidence prior to entering judgment against him. Thompson had such evidence in his possession and, contrary to the findings of the district court, most of it was in the record.

Habeas counsel had a neuropsychologist, Dr. Barry Crown, examine Thompson. The result was a finding of organic brain damage, secondary to schizo-affective disorder, bipolar subtype. (Apx. 711).

. . . .

Additionally, forensic psychologist Dr. Faye Sultan reported:

> It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Thompson's ability to conform his conduct to the requirements of the law.

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> Further, Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Thompson's social history that have been recognized as mitigating in other capital cases (R. 133, Attachment A, Sultan report, p. 6).

Despite this unrebutted expert testimony the district court noted from the trial court record that "[t]he team at Central State concluded there was no organicity (brain damage) and Dr. Copple [the industrial psychologist] found no indication of brain damage" (Apx. 701) and ruled, due to a lack of affidavits "Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute" (Apx. 711). The petition was dismissed.

Thompson's Petition for Certiorari, p. 14-16 (emphasis added).

Hansen also represented that:

> The district court engaged in fact finding to grant Respondent's motion by crediting the opinions of Respondent's experts over Thompson's experts and by disregarding the findings of Thompson's experts that he was psychotic when he committed the offense (Apx. 657). The district court also did not give Thompson an opportunity to correct certain fundamental misconceptions upon which the district court's decision was based. The district court erred further by making findings that were unsupported or contradicted by other evidence, and drawing inferences adverse to Thompson, contrary to well-settled summary judgment standards.

Id. at 24.

Further, Hansen asserted that:

> The district court disregarded the rulings of Thompson's experts – in particular Dr. Blair's opinion that Thompson likely was schizophrenic when he committed the offense, Dr. Sultan's opinion that Thompson suffers from schizo-affective disorder and that his mental problems began while he was in the military – *i.e.* long before the offense. Instead the

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Kissinger's and Hansen's unusual performance is, and should be criticized as, inadequate, and should not escape close judicial scrutiny. Both of these attorneys are federal defenders, specializing in death penalty cases. If their conduct was negligent, then perhaps they should not perform this kind of work in the future. If their conduct was something more than that, then appropriate disciplinary action should be taken. Furthermore, my and the majority opinion's disagreement over the proper characterization of this conduct is precisely why there is a need for the district court or a duly-appointed Special Master to conduct a full evidentiary hearing on this issue to ascertain the truth.

The majority opinion correctly states that we could not consider Dr. Sultan's deposition testimony because it was not made a part of the record before the district court, and beyond the scope of our appellate review. *See Lippi v. City Bank,* 955 F.2d 599, 604 (9th Cir. 1992). *See also United States v. Barrow,* 118 F.3d 482, 487 (6th Cir. 1997) (stating that, "[i]n general, the appellate court should have before it the record and facts considered by the District Court"); *cf. Sovereign News Co. v. United States,* 690 F.2d 569, 571 (6th Cir. 1982) (stating that "[a] party may not by-pass the

court cursorily concluded Thompson had not provided "any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." *Id.*

Id. at 28.

In short, the brief before the United States Supreme Court accuses the district court of ignoring probative evidence *that it did not even have before it in any form* when it granted summary judgment to Respondent.

fact-finding process of the lower court and introduce new facts in brief on appeal"). Furthermore, appellate habeas counsel did not file a Fed. R. App. P. 10(e) motion to supplement the record[23] nor make any reference to Dr. Sultan's July 1999 testimony in the appellate brief.[24] Nor did appellate

[23] Federal Rule of Appellate Procedure 10(e) allows the appellate record to be supplemented "if anything material to either party is omitted from or misstated in the record by error or accident." Fed. R. App. P. 10(e). It "is clear from the rule's wording [that] '[t]he purpose of the rule is to allow the [] court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals.'" *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003) (quoting *S & E Shipping Corp. v. Chesapeake & O. Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982)) (alteration in original). Dr. Sultan's July 29, 1999 testimony and accompanying report do not qualify as omissions from the record because Kissinger never referenced her expert opinion on the issue of Thompson's mental status at the time of the offense; i.e., he did not rely on that evidence as part of meeting Thompson's burden under Fed. R. Civ. P. 56.

[24] Thompson's appellate brief, prepared by Dana C. Hansen, provides merely that:

> Mr. Thompson then filed a petition for writ of habeas corpus under 28 U.S.C.A. § 2254 (West 2000), claiming *inter alia* ineffective assistance of trial counsel via the failure to obtain adequate expert assistance regarding Mr. Thompson's mental health at the time of the offense. Respondent moved for summary judgment while conceding that this point was properly cognizable on its merits (R. 82: Motion for Summary Judgment, p. 18-19; Apx. 442).
>
> The defense then had another specialist, Dr. Crown, examine Mr. Thompson. The result was a finding of organic brain damage, secondary to schizo-affective disorder, bipolar subtype. (R.124: Memorandum, p. 54; Apx. 711).

Final Brief of Appellant, Gregory Thompson, p. 14.

Later, Hansen asserted on behalf of Thompson that

> [t]he district court clearly weighed the *partial* testimony of Drs. Crown and Blair versus that of the state experts and made findings of fact in favor of Respondent. (*Id.* at 53-54; Apx.

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habeas counsel appeal the district court's 60(b) ruling. It is disingenuous for the majority opinion to suggest that we "had" the deposition before us at the time of the initial review and therefore had not just recently "unearthed" it. Indeed, had the deposition had been properly placed before this Court, we could have exercised our equitable powers at that time. Our previous decision was based on the absence of the evidence. The only reason we have it now was because I conducted an independent review of the record.

The majority opinion holds that we can exercise our inherent equitable power to supplement the record on appeal. Here I agree, because I feel that the "special circumstances" of this case – a fortuitous discovery that, if left unaddressed, will result in a grave miscarriage of

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710). This is improper at the summary judgment stage. *Anderson, supra.* The district court did not view the facts in the light most favorable to Mr. Thompson to determine whether any "genuine issue of material fact" appeared on which a reasonable fact-finder could return a verdict for Mr. Thompson.

Id. at 42.

Hansen never *mentions Dr. Sultan's name or refers to her opinion in the brief.*

However, Hansen makes ample reference to Dr. Sultan's testimony and report in Thompson's petition for rehearing. *See* Gregory Thompson's Petition for Rehearing and Suggestion for Rehearing *En banc* In a Capital Case, pp. 12-22. In fact, in support of the assertion that Thompson presented evidence that he was mentally ill at the time of the crime and trial, Hansen, presented, *inter alia,* ample quotations from and references to Dr. Sultan's testimony and report, attached to Thompson's Rule 60(b) motion. She failed to indicate, however, that said evidence was not properly presented to the district court, and therefore never part of the record for review to this Court. She did not indicate that she failed to appeal the district court's Rule 60(b) ruling. She did not invoke the inherent equitable powers of the Court.

justice – justifies our invocation of this authority. Indeed, by reviewing Dr. Sultan's opinions on the merits and altering the opinion, that is what I did in my capacity as a judicial officer. However, our inherent equitable authority to review material that was never reviewed by the district court to right a very grave wrong in this case should not immunize Kissinger's and Hansen's professional performance from further examination. Thus, although it provides a separate basis for jurisdiction, those inherent equitable powers should not be used to cover up potentially fraudulent conduct by counsel on the court by federal habeas counsel. Again, though, this matter needs a thorough examination in the district court.

Finally, if further investigation into the attorneys' conduct here is not pursued, this could create dangerous precedent. That is, it virtually invites habeas counsel to save their best evidence for last, thereby undermining principles of finality and the AEDPA. And, at the same time, it potentially encourages counsel to engage in risky strategy, because there is no guarantee that any given panel of the Sixth Circuit will bypass the strict procedural and substantive requirements of the AEDPA simply because the matter happens to involve the death penalty. Here, but for the chance discovery of the Sultan affidavit, this matter could have gone in a different direction, and Thompson might well have been executed as scheduled on August 19, 2004.[25]

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[25] Meanwhile, Gregory Thompson has been facing the true specter of the death penalty since at least January 9, 2003. For this fundamental reason, I feel that habeas counsel's performance was truly, horribly, ineffective.

V. Conclusion

In the face of this record, Kissinger's explanation is implausible, and if not intentionally false, most certainly appears to be in reckless disregard for the truth. Meanwhile, a man's life hangs in the balance. As in *Demjanjuk*, we have "acted pursuant to our inherent power to protect the integrity of the judicial process within this Circuit." *Demjanjuk*, 10 F.3d at 356. *Cf. Hazel-Atlas Glass Co.*, 322 U.S. at 244 (recognizing a court's inherent power to grant relief, for "after-discovered fraud," from an earlier judgment, "regardless of the term of [its] entry"). As part of the order of remand, I would instruct the district court to conduct full evidentiary hearings on both the issue of ineffective assistance of counsel at mitigation and fraud upon the court.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON, *Petitioner-Appellant,* *v.* RICKY BELL, Warden, *Respondent-Appellee.*	No. 00-5516

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 98-00006 – R. Allan Edgar, Chief District Judge.

Argued: November 1, 2001

Decided and Filed: January 9, 2003

Before: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Dana C. Hansen, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF**: Dana C. Hansen, FEDERAL DEFENDER SERVICES, Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

SUHRHEINRICH, J., delivered the opinion of the court. MOORE, J. (p. 47), delivered a separate opinion concurring in the result. CLAY, J. (pp. 48-73), delivered a separate dissenting opinion.

OPINION

I. Introduction

SUHRHEINRICH, Circuit Judge. Petitioner-Appellant Gregory Thompson ("Thompson") was convicted of first degree murder and sentenced to death in the Tennessee state courts. He appeals from the order of the district court denying his motion to alter or amend its grant of summary judgment to Respondent Warden Ricky Bell ("Bell") on Thompson's application for a writ of habeas corpus under 28 U.S.C. § 2254. This Court granted a certificate of appealability as to all issues presented.

Petitioner's principal argument on appeal is that he was denied his Sixth Amendment right to effective assistance of counsel in both the guilt and penalty phases of his capital trial because his trial attorneys failed to investigate and present evidence regarding his mental illness and social history and failed to present evidence in support of a life sentence. Because we find that Thompson has presented no evidence that he was mentally ill at the time of the crime or at trial, we **AFFIRM** the judgment of the district court.

II. Background

A. Facts

The following facts involving the underlying crime are summarized by the Tennessee Supreme Court:

> On December 29, 1984, Thompson and Joanne McNamara, a juvenile female, traveled by bus from Marietta, Georgia, to Shelbyville in Bedford County, Tennessee. They presented themselves as a married couple at the home of Willa Mae Odum, an acquaintance of McNamara's family who allowed them to stay. Ms Odum learned the two were not married and asked Thompson to leave, but he remained through the night of December 31, waiting for a relative to wire him funds for a bus ticket. The following morning, January 1, Ms. Odum again insisted that Thompson leave, and she called the authorities to report that Joanne was a runaway. This call apparently prompted their departure. The couple, having little money and no transportation, spent the afternoon at a nearby Wal-Mart store.
>
> Late that same afternoon, January 1, 1985, Brenda Lane, a local resident, made several purchases at the Wal-Mart, and did not arrive home when expected. Shortly after midnight her yellow Chevrolet was reported on fire near an apartment building in Marietta, Georgia. Thompson and McNamara were arrested by Cobb County authorities in connection with this investigation on the night of January 2. A traffic ticket in Thompson's jacket showed he had been cited for speeding, while driving Mrs. Lane's vehicle, at 8:25 p.m., on Interstate 24 near the Jasper-South Pittsburgh exit, the last exit before the Georgia line. A Wal-Mart receipt and several items in the

vehicle indicated a purchase at that store at 5:51 p.m. January 1. A button found in the car matched those on Thompson's clothing.

A few hours later, while in custody, Thompson gave a statement admitting that he had abducted a woman at knifepoint from the Wal-Mart location in Shelbyville and had forced her to drive him and his companion, in her car, to a remote location outside Manchester, Tennessee. There he had stabbed her, driven the car over her body, and left her. He and McNamara had returned to Marietta and attempted to burn the vehicle. He also drew a map illustrating the route from the town to the site of the stabbing and describing several structures and other features along the way. He spoke on the phone with authorities in Manchester to clarify his directions.

In the early morning hours of January 3, a team of searchers following Thompson's directions found Brenda Lane at the place indicated in his statement. She was dead from multiple stab wounds to her back. Two of the four wounds had been fatal, penetrating her right lung and causing her to bleed to death. A forensic pathologist testified that she would not have died immediately, but would have remained conscious for five to ten minutes. At the scene she lay on her back, her body arched, her heels dug into the ground. One hand clutched several blades of grass, and the other held a tissue. There was no evidence that she had, in fact, been run over by a vehicle. There was no evidence of a struggle, and apart from the stab wounds Ms. Lane was not injured.

State v. Thompson, 768 S.W.2d 239, 243 (Tenn.1989).

B. Pretrial Preparation

On January 29, 1985, the trial court appointed H. Thomas Parsons and John W. Rollins to represent Thompson. On February 26, 1995, Parsons filed a notice of insanity defense and also requested a mental or psychological evaluation of Thompson to determine whether he was competent to stand trial, and to further determine his mental capacity at the time of the crime.[1] On March 25, 1985, trial counsel filed a supplementary motion for a psychiatric examination and a neurological examination to determine whether Thompson was competent to stand trial and assist counsel with his defense, whether Thompson was suffering from a mental illness on the date of the offense, and whether he was in need of hospitalization for further psychiatric treatment and evaluation. In support, Parsons attached an affidavit stating that Thompson had previously suffered two concussions, one when he was sixteen years old from a car accident, and the second while in the Navy, when he was beaten in the head with a hammer by three fellow servicemen.

On March 28, 1985, the trial court ordered that Thompson be referred to the Multi-County Mental Health Center for a forensic evaluation to determine his competency to stand trial and to assist in his own defense, and his mental capacity at the time of the crime.[2] On April 4,

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[1] Rollins did not participate in Thompson's representation due to a conflict of interest, and was relieved of his appointment on April 9, 1985. Doyle Richardson was substituted as co-counsel the same day. He remained as counsel through the state proceedings on direct appeal.

[2] Specifically, the staff at Multi-County Mental Health Center was directed by the court, in part, as follows:

> The staff shall assess if, at the time of the criminal conduct, as a result of mental disease or defect, [the defendant]

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1985, the trial court entered another order directing Thompson to undergo a forensic evaluation at a state facility, Middle Tennessee Mental Health Institute ("MTMHI"), for a maximum of thirty days. A team of forensic psychiatrists and psychologists at MTMHI evaluated Thompson. They found Thompson to be competent.

Trial counsel questioned the impartiality of the state psychiatrists and psychologists and requested funds to secure further psychiatric evaluations.[3] On July 29, 1985, the state trial court granted the request. The order provides in relevant part:

> This cause came to be heard on the 10th day of July, 1985 . . . upon the request of defendant's attorneys for the Court to approve the expenses for a private evaluation of the defendant by a private psychiatrist and for the purpose of affording counsel the benefit of private expert psychiatric consultation in regards to the defendant. . . .

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lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The terms "mental disease or defect" do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[3] Trial counsel Richardson stated at the pretrial motion on July 10, 1985:

> I really don't believe he got an impartial review on that. It would almost appear from the reports that the psychiatrist is just an extension of the State. I don't believe he has had a really independent review, and it is something that the defendant is starting to complain about. I've got mixed emotions about an independent psychiatrist – it is sometimes a two-edged sword. Whatever is told to them, they can be called to testify about it and have to; but that's not to say that I don't need it.

> The Court is of the opinion that the Motion for resources is well taken . . . and that expert consultation is necessary to ensure that the constitutional rights of the defendant are properly protected.
>
> Accordingly it is hereby ORDERED that the charges of said psychiatrist . . . shall be paid by the executive secretary of the Supreme Court of the State of Tennessee for services performed by them on behalf of the defendant.

In spite of the court order approving a psychiatrist to examine Thompson, counsel used the court-ordered mental health funds to hire Dr. Copple, a clinical psychologist.[4] Doyle Richardson, one of Thompson's trial counsel, stated subsequently that the effort to hire a psychiatrist simply "was not successful."

As part of their pretrial preparation, counsel also traveled to Thompson's home town, Molena, Georgia. There, they interviewed police officers, Thompson's teachers, his grandmother, his step grandfather, sister, brother, cousin, and several neighbors.

C. Trial Proceedings

Thompson presented no proof during the guilt phase of the trial, and the jury convicted him of first degree murder of Brenda Lane. *Thompson*, 768 S.W.2d at 244.

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[4] On June 20, 1985, trial counsel filed a "Notice of Intent to Use Industrial Psychologist." The notice stated that Thompson intended "to use the testimony of Dr. George Copple, Clinical Psychologist, in the trial of this cause in regard to defendant's mental condition and abilities."

Trial counsel testified at the post-conviction hearing that they felt the guilt phase case could not be defended.

During the sentencing phase, Thompson called a number of witnesses, including former high school teachers, acquaintances, his grandparents, two siblings, and a cousin. All described Thompson as non-violent, cooperative, and responsible. *Id.* Witnesses described in detail his childhood and family circumstances in Georgia until he left in 1979 to join the Navy. The Tennessee Supreme Court noted in its opinion that, "while [Thompson's] family was poor, it was also good and loving." *Id.*

Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, testified that she knew Thompson from December 1980 until June 1984. She described their relationship as good, one that she was "very proud to have experienced," and stated that Thompson was caring and sensitive. She testified that Thompson suffered a head injury when three of his fellow service members attacked him with a crow bar and that he became paranoid and unreasonably concerned about his and her personal safety thereafter. *Id.* On cross-examination, Cajulao testified to incidents concerning Thompson's violent behavior in the Navy. She stated that Thompson was discharged from the Navy after being court-martialed for shoving a petty officer and either dislocating the officer's shoulder or breaking his collarbone. Cajulao acknowledged that Thompson had other violent episodes in the Navy. *Id.*

Thompson's sister, Nora Jean Walton, and his brother-in-law testified about Thompson's activities in Georgia upon his return from Hawaii after his discharge from the Navy. *Id.* While in Georgia, Thompson became involved in

a relationship with Joanne McNamara. Walton testified that Thompson told her that McNamara's mother was trying to force McNamara into prostitution. *Id.*

Copple also testified at sentencing. Copple is a clinical psychologist, licensed in the State of Tennessee. He obtained his Ph.D in clinical psychology from the University of Pittsburgh in 1948. He taught in the psychology department at Vanderbilt University from 1948 to 1969, and ran a clinical practice as well. At Vanderbilt, Copple taught normal psychology courses and the abnormal psychology course, child psychology, and courses in the giving of psychological testing. While at Vanderbilt, he served as the consulting psychologist at Western State Hospital in Hopkinsville, Kentucky. Part of his duties there was to interview patients as to their ability to stand trial. Copple testified that "the main part of my work over the years – well, all of it – has been clinical psychology."[5] He added that the emphasis has differed at times, to include evaluations for social security applicants and vocational evaluations. Copple explained that the former task involved psychological evaluations of individuals alleging they have problems that would prevent them from

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[5] When asked on cross-examination whether he "basically [held] [himself] out as an industrial psychologist more than a clinical psychologist," Copple said:

> No. My licensing in the State of Tennessee is as a clinical psychologist. The application that I make of it most frequently is concerning the abilities and the lost abilities, to some extent, of individuals. I don't believe that – the majority of my work is actually Social Security Administration evaluations, and that is not really industrial psychology. That is clinical psychology, but it is from the standpoint of making a psychological evaluation as relating to whether a person can work anymore or not.

working, and that vocational evaluations are used for "helping people reach their vocational goals or choosing vocational goals. . . . " Copple further stated that the social security evaluations are "not really industrial psychology. That is clinical psychology, but it is from the standpoint of making a psychological evaluation as relating to whether a person can work anymore or not."

Copple testified that he spent roughly eight hours examining Thompson over several sessions. In the first session on May 15, 1985, Copple met with Thompson at MTMHI for three and one-half hours. Copple stated that "I was looking, at that point, at what things he might be capable of doing in a prison situation." Copple started with some ability testing, including a reading level test, a test of mathematical functioning, and a test of mechanical reasoning. Copple also gave Thompson a Career Preference Test.

At the second session on August 2, 1985, Copple spent about three and one-half hours with Thompson at the Coffee County Jail. At that meeting Copple administered the Minnesota Multiphasic Personality Inventory ("MMPI"), the Thematic Apperception Test, the Rotter Incomplete Sentences Blank, and the Rorschach or Ink Blot Test. Copple also had two twenty minute sessions with Thompson after the trial began.

Copple stated that Thompson had the arithmetic level of a seventh grader, and a sixth grade level in reading. Copple also stated that Thompson scored at about the 64th percentile of high school graduates on a standard reasoning test. Copple testified that, in his opinion, Thompson had an unusually strong need to nurture other people, and that this "exaggerated need for nurturance" of McNamara,

may have led, in part, to the murder of Mrs. Lane. In Copple's view, Thompson's need to nurture "was very strong, strong enough to impel him to some unwise actions." Copple also testified that Thompson exhibited strong remorse for the killing and did not have adult antisocial personality. On cross-examination, Copple stated that he did not think Thompson was suffering from any mental illness.

In rebuttal, the State presented the deposition testimony of Dr. Robert Glenn Watson, also a clinical psychologist licensed by the State of Tennessee, who had participated in a staff evaluation of Thompson at MTMHI. Watson stated that the purpose of the evaluation was to determine the mental competence of Thompson to stand trial and to determine his mental status at the time of the alleged murder. Watson explained that Thompson received three kinds of examinations; a physical examination, which included an electroencephalogram, a psychological evaluation, and a psychiatric examination. Watson testified that the electroencephalogram showed no sign of brain damage, i.e. the EEG was normal.[6]

Watson described the tests he personally performed. First, he administered the Wechsler Adult Intelligence Scale, Revised, which assesses intellectual functioning and potential. Watson found that Thompson had a verbal I.Q. of 93, a performance I.Q. of 89, and a full-scale I.Q. of 91, which placed him in the lower-range intellectually, and also indicated "that there is no intellectual impairment that would play a part in the forensic questions." Next,

[6] Watson stated that he did not interpret the EEG, which is a medical test.

Thompson was given the Wide-Range Achievement Test, primarily for the purpose of assessing his reading ability. Watson explained that this test was chosen because Thompson had claimed he could not read or write. (*Id.*) Watson found that he was reading at a level better than 70 percent of the test population. Third, Watson gave the Bender Visual Motor Gestalt Test. Watson stated that this test provides a general assessment for brain damage. He further explained that it is a drawing test, and that "we are looking for evidence of organicity there." When asked to explain what he meant by organicity, Watson, replied:

> Psycho-motor impairment. This is brain damage. There was a history in his background of a concussion at age 16 with reported hospitalizations. We didn't have the records from that. He also had a history of being hit over the head with a hammer while he was in military service in 1980. We were looking for brain damage.

Watson continued:

The results of the Bender showed a few errors, but no real evidence of organicity or brain damage. To further test this, the Bender Interference Procedure was done, and what we expect is that the results of that procedure will be worse than the results obtained on the original test . . . [i]f he is suffering from organicity. . . .

> We found less errors on the B.I.P. – the Bender Interference Procedure – than on the original, and this further strengthened our belief that there is no serious organicity here.

Watson also performed the MMPI. He stated that this test was administered for the purpose of assessing deviations from the normal test population, indicative of some type of mental illness or defect. Watson found that the test results reflected malingering. Thompson was further given the Tennessee Self-Concept Scale, which measures the individual's self-concept, but also provides clinical indications of abnormality. Watson stated that the test results showed that Thompson has a good self-concept. Watson continued that only the General Maladjustment Scale was elevated a little bit above average, but not outside normal limits, and that "these results showed no evidence of marked mental disturbance." Watson testified that the psychological tests were therefore consistent with the normal EEG. Because the psychological tests and the EEG were within normal limits, no further organic tests were done.

Watson stated that on May 24, 1985, a staff conference was held in which all the data, including the medical, psychological, and social history, was reviewed and summarized.[7] The staff concluded that:

> [Thompson] exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness

[7] Watson testified that although he was aware of Thompson's head injuries, he did not have the hospital records.

> direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.)

The team diagnosed Thompson as Axis 1, Adult Antisocial Behavior, 071.01.[8] The forensic team therefore concluded that Thompson was mentally competent to stand trial and was not suffering from a mental disease or defect.

In imposing the death penalty at the conclusion of the penalty phase, the jury found three aggravating circumstances pursuant to Tenn. Code Ann. § 39-2-203(i) (1982): (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, (2) the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution, and (3) the murder was committed while the defendant was engaged in committing robbery or kidnapping. The trial court entered judgment sentencing Thompson to death by electrocution. His judgment of conviction and death sentence was affirmed by the Tennessee Supreme Court. *Thompson,* 768 S.W.2d at 253. The United Supreme Court denied certiorari. *Thompson v. Tennessee,* 497 U.S. 1031 (1990).

D. State Post-Conviction Proceedings

On October 16, 1990, Thompson filed his original petition for post-conviction relief in the Coffee County Criminal Court, claiming, *inter alia,* ineffective assistance

[8] The number refers to the catalog number of the diagnosis in the *Diagnostic and Statistical Manual,* 3rd Ed. Watson explained to the jury that adult antisocial behavior is not a per se mental illness or defect or mental disorder, but a recognized set of behaviors.

of trial counsel.[9] Thompson alleged in pertinent part that trial counsel failed to: (1) adequately investigate Thompson's background and personal and medical history for the existence of mitigating evidence; (2) request and obtain expert and investigative assistance regarding Thompson's head injuries or to obtain adequate expert assistance regarding Thompson's competency at the time Thompson made incriminating statements to the police; (3) present an adequate defense at trial because they failed to cross-examine numerous witnesses and failed to challenge the prosecutor's implication to the jury during closing arguments that Thompson was required to present a defense; (4) request additional time to prepare witnesses, such as Arlene Cajulao, during the penalty phase of the trial; (5) adequately investigate Thompson's military career, therefore improperly raising the issue of his "good character" and opening the door for the prosecution to admit damaging information about him.

On February 1, 1991, post-conviction counsel filed an *ex parte,* sealed motion for funds for expert assistance of a psychologist and investigator. In the motion counsel requested "funds to hire a licensed psychologist or psychiatrist and an investigator to assist in the preparation of his case for post-conviction relief." Counsel submitted the affidavit of Dr. Gillian Blair, a licensed psychologist. Blair stated that she reviewed Thompson's post-incarceration medical records, which indicated that Thompson had been variously diagnosed as having bipolar affective disorder, a schizo-affective disorder, and schizophrenia paranoid type, and was taking Lithium, Haldol, and Cogentin. Blair

[9] During this stage of the proceedings Thompson was represented by new counsel.

opined that "[i]f Mr. Thompson is found to be suffering from neurological or psychological impairment as described above, it is likely that some degree of such impairment would have existed at the time of the offense and would have been a significant factor in determining whether or not Mr. Thompson was able to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law when he committed the homicide of which he stands convicted." Blair stated that Thompson was in need of a full psychological evaluation.

The state trial court conducted an evidentiary hearing on March 27 and 29, 1995. Both of Thompson's trial counsel testified. Defense attorney Parsons testified that he knew about the head injuries, which included "one in a car wreck when he was young and at home and another as a result of an assault in the military." Parsons also acknowledged that trial counsel attempted to, but did not obtain, all of Thompson's medical records. Parsons indicated that trial counsel did not present evidence at trial of Thompson's head injuries because "we would had to have some expert proof and we did try to have him tested through the State and they did do some tests on him in an attempt to develop that." Parsons further stated that trial counsel also had their own expert, Copple.[10]

On cross-examination, Parsons acknowledged that trial counsel had sought a mental evaluation and that it failed to show mental illness or defect. Parsons further agreed that since there was virtually no likelihood that

[10] Parsons stated that Copple was chosen because co-counsel Richardson had taken a course from Copple while Richardson attended Vanderbilt and Copple was the head of the psychology department.

another psychiatrist could find mental illness, counsel "wanted to develop from Dr. Copple his testimony that [Thompson] had some positive characteristics, had abilities that would be beneficial to society wherever he was." Nonetheless, in response to the question that there was no evidence of organicity and that Copple had concluded that Thompson was sane, Parsons stated:

> The thing that struck me so strongly throughout this whole case was really to do with that, and that was the difference in the man when he lived in Georgia and grew up there and what kind of person he was as opposed to someone who committed – allegedly committed this act, this murder and that was a tip off that there may well have been some kind of brain injury, but I didn't know a whole lot about that at the time but since, I have found that most closed head injuries will do a lot of things, and we read some articles, one of which you will get in this discovery about that.

Parsons further reflected that

> Well, I could never figure out why it happened, assuming it happened, assuming he killed her. Of course, either he did or his girlfriend did but I could never understand how he could do it. I couldn't understand that then and why, because there were other alternatives. Why? That puzzled me and everybody else, I think, associated with this case all the way through it.

> Regarding efforts to find a psychiatrist Parsons stated:

> I do want to say this and this is sincere. You know, we were required to send him for the evaluation, we felt, at the Middle Tennessee

> Mental Health Institute. I have literally no faith in any conclusion that comes out of that place, then or now. I didn't have any faith in what came out of it then. I still thought something might be wrong but we didn't have any other place to go that we knew of.

Notwithstanding, Parsons denied that trial counsel failed to pursue the head injury theory, although he conceded that "we may have not pursued it enough."

Co-counsel Richardson testified that Thompson told counsel about his head injuries and that they followed up on that by hiring "Copple, a clinical psychologist, [who] gave him a battery of tests in respect to that."[11] Richardson acknowledged that the team at MTMHI found no evidence of organicity, but added that "we wanted a psychiatrist of our own." Richardson stated:

> [We d]id try to hire a psychiatrist but that was not successful and it was, you know, it was the type [of] thing it was a theory as to whether to go with his good character and reservoir of moral upbringing, a man with a great deal of ability that could be used in the penitentiary and a life sentencing. I doubt if there will ever be another man on death row that had as good a background as he did. I don't know of any, and then the question as to whether to mix into that or try to accentuate some brain damage that we hadn't been

[11] Richardson stated:

> I believe the tests that they gave – that they give will reflect whether or not there is some brain damage or not. . . . I believe clinical psychologists do this for psychiatrists. They do the testing that will detect if a person's brain is not functioning properly from injury.

> able to spot, but at the same time, probably with some more digging may [sic] could have and then give the jury the idea that this man, if he ever gets out of prison with some brain damage, he will kill . . . somebody else, that is kind of counter productive. We went with one strategy and probably if we had to do it over again, would go with the other strategy because that one didn't work.

However, when asked: "[o]f course, it is speculation you could have found a psychiatrist to say he had brain damage?" Richardson stated that he "[p]robably could have."

Dr. Gillian Blair testified next. Blair is a clinical psychologist, with a master's degree in developmental and clinical psychology from Vanderbilt, and a Ph.D. in developmental and clinical psychology from Vanderbilt. After graduating from Vanderbilt in 1988, Blair worked at MTMHI as a psychologist in their Forensic Services Department and at the same time maintained an appointment at the Vanderbilt Psychiatry Department. In 1989 she went into private practice.

Blair testified that she began reviewing Thompson's institutional records in 1990, including the records from the assessment at MTMHI in 1985. She interviewed Thompson several times in March and April 1992 while he was incarcerated at Riverbend Maximum Security Institution. At that time Blair administered "a basic psychological battery of tests with some additional . . . neuropsychological tests because of the history of head injuries that Mr. Thompson had received and that were well documented in his medical record."

Blair testified that, based on the review of Thompson's medical record, she formed the following opinion:

The Riverbend medical record indicated that since 1985, Mr. Thompson had shown a deteriorating mental status. He had become psychotic. He had been treated with anti-psychotic medication at that time. He was treated with Haldol, Cogentin, and Lithium, and three different treating psychiatrists at that time: Dr. Dyner [sic], Dr. Deal, and Dr. Humble had all over the years from 1985 to 1990 had diagnosed him as either having bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide on a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him.

When asked what other facts would be necessary for her to develop an opinion as to Thompson's condition at the time of the offense, Blair stated that "the most important thing that would be necessary would be a full history and full medical records of Mr. Thompson prior to the commission of the offense." She added:

> From the records I was able to review, it was clear that the social history was very sketchy in terms of his remote history, his childhood and his upbringing, and also family history of mental illness. There seemed to be a [sic] strong evidence to suggest that there was mental illness in his family, probably in his father who committed suicide and was known to be extremely violent and possibly in his mother but none of those records were available.

She therefore stated that she did not have an opinion about Thompson's diagnostic status in 1985.

On cross-examination, Blair testified that she reviewed all of the records that are in the medical record from MTMHI. This included daily progress notes, medication sheets, the report of the psychological testing, the discharge summary, the admission summary, the staff conference report, and the social worker's history. When asked if she thought any of the test procedures were unreliable, she stated that she did not review the raw test data. When asked if she thought that the testing procedure done at MTMHI in 1985 was unreliable, Blair responded: "I don't think it was unreliable. I think that it was not extensive enough." When asked what tests she performed, Blair explained:

> The tests that I administered in 1992 that directly addressed whether there was psychosis or not, I administered the PAI, I administered the MMPI II which replaces the MMPI which was administered in 1985. I administered the Rorschach which was not administered in 1985. The PAI was not administered in 1985. I administered the MCMI II and I administered the Rorschach, which is a projective test of personality which was not – the others are all objective. They are all tests in which an individual answers true or false and the Rorschach is very different.

Blair stated that from her battery of tests, she did not conclude that Thompson was faking or attempting to fake mental illness.

On May 15, 1995, the post-conviction court denied Thompson's claim, including his ineffective assistance of counsel claim and his request for funding to hire an expert. The court found:

> 1. Defense counsel made an adequate investigation of their client's background and prior medical history. Present counsel presented no proof of mental problems on the part of Mr. Thompson that would have been a defense to the charge, or that would constitute a shield against execution.
>
> 2. Counsel did not seek expert and investigative assistance regarding alleged head injuries to Mr. Thompson during his youth, or to testify as to his incompetency at the time of his confession, because the facts and circumstances did not indicate the necessity for such action.
>
> 3. Counsel did not fail to present an adequate defense at trial. The facts simply left them with no effective defense.

Thompson appealed to the Tennessee Criminal Court of Appeals. He alleged that his trial attorneys were ineffective for failing to (1) interview witnesses who could have aided in his defense, especially during the penalty phase, (2) adequately investigate his prior head injuries, and (3) adequately prepare the defense witnesses.

The Tennessee Criminal Court of Appeals affirmed. *See Thompson v. State*, 958 S.W.2d 156 (Tenn.Crim.App. 1997). It concluded that Thompson failed to demonstrate

any psychological impairment that may have existed which would have constituted mitigating evidence or that Thompson's alleged head injuries had any effect upon his mental stability at the time of the murder. *Id.* at 165.

As for Thompson's claim that trial counsel were ineffective for failing to interview witnesses to show that his head injuries might have contributed to his commission of the crime, including among others, his step-father, attorney in the military, and the mother of his co-defendant, the court found that Thompson was unable to show prejudice because none of the witnesses testified at the post-conviction hearing. *See id.* at 163-64. "We cannot speculate upon the usefulness of these witnesses without the information they could have provided." *Id.* at 164.

Regarding the failure to investigate alleged head injuries, the Tennessee Court of Criminal Appeals held:

> Having determined there is a duty to investigate whether any psychological impairments might qualify as mitigating evidence, we nonetheless conclude that the petitioner has failed to demonstrate any prejudice from the failure of trial counsel to further investigate the head injuries. *The petitioner has failed to establish that the head injuries had any effect upon his mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence.* Because Dr. Blair declined to give an opinion on these important issues, the evidence does not preponderate against the trial court's finding that the defense attorneys were not ineffective.
>
> The decision not to further pursue the head injuries in the penalty phase of the trial also

> qualified as a reasonable strategy. Trial counsel's decision to emphasize the petitioner's positive qualities rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation. [T]he fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference must be given to an informed trial strategy. . . . Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion.

Id. at 165 (emphasis added; internal quotation omitted).

The Tennessee Court of Criminal Appeals further rejected Thompson's claim that trial counsel did not properly prepare defense witnesses to testify, particularly, Arlene Cajulao, thereby permitting the state to inquire about his negative military history. The court found:

> At the post-conviction hearing, Attorney Parsons recalled wishing that he had more time to meet with the witness. He testified that his strategy at trial was to humanize the petitioner by calling sympathetic witnesses. He was aware of the state's opportunity to rebut any positive testimony about the petitioner and conceded that his only other option would have been to present no mitigating evidence at all.
>
> Attorney Richardson testified that "[t]here were certain witnesses that we had to face a problem of them bringing up the problems that he had in the Navy." He realized that the cross-examination of Ms. Cajulao might be risky but "didn't realize we would have it to the extent that it ended up we had. . . . "

> In our view, defense counsel's awareness of the possible dangers inherent in the cross-examination and their decision to present her positive testimony anyway was a classic tactical decision. Because the strategy was based upon adequate preparation, this court must not second guess. . . .
>
> Moreover, there is nothing in the record to suggest that additional preparation time with the witness could have prevented the state from effectively cross-examining her. If Ms. Cajulao were to testify at all to the petitioner's prior military background, the state would be entitled to rebut that testimony. In summary, we cannot hold that the evidence preponderated against the finding of the trial court that trial counsel had performed effectively.

Id. at 166.

Lastly, the Tennessee Court of Criminal Appeals rejected Thompson's ineffective assistance of counsel based on the claim that trial counsel opened the door to damaging evidence at the penalty phase. Thompson had complained that the state was allowed to present damaging evidence in rebuttal through Dr. Watson because trial counsel asked Copple about his good qualities. The Tennessee Court of Appeals reasoned:

> Attorney Richardson admitted, "I frankly did not know that . . . the [s]tate could use information given by the defendant to a psychiatrist." Attorney Parsons testified that their strategy was to emphasize positive attributes of the petitioner and show the jury that he could lead a productive life in prison. Dr. Copple's testimony played a key

role in this strategy. Although both trial attorneys apparently were surprised by the fact that the state could use the information acquired by MTMHI, Attorney Parsons did acknowledge that he knew that positive testimony by Dr. Copple would open the door for the state to present negative information.

Again, the petitioner has failed to establish any prejudice by whatever deficiency there may have been in the performance of counsel. The evidence does not preponderate against the finding that the sentence would have been different if the attorneys had known the information collected by MTMHI would have been admissible. In our view, trial counsel had little choice other than to call Dr. Copple in an effort to establish adequate mitigating circumstances. Even if there had been proof that trial counsel should have pursued a different strategy, there has been no indication that another strategy would have been more effective. Because the jury found three aggravators, we cannot conclude that the outcome would have been any different if the jury had not heard the evidence concerning the testing by MTMHI. If any witness testified to the petitioner's good character, the state would have been entitled to rebuttal. The only other option would have been to present no proof at all. As Attorney Richardson noted, the petitioner had a relatively productive background; the failure to present some evidence of his prior good behavior might have qualified as ineffective assistance.

Id. at 167.

The Tennessee Supreme Court denied Thompson's application for permission to appeal on October 20, 1997.

E. Federal Habeas Action

Thompson then brought this federal habeas action. Among numerous allegations, Thompson claimed that he was denied funding for mental health and investigative experts at trial and during state post-conviction proceedings, in violation of his right to due process. He also alleged a violation of his Sixth Amendment right to effective counsel. In particular, Thompson asserted that his trial counsel were ineffective for failing to: (1) perform a reasonable investigation of his background and mental health history; (2) secure adequate expert assistance regarding his mental health[12]; (3) discover available evidence of mental illness caused by two serious head injuries; and (4) investigate and challenge Thompson's competency to stand trial as well as his competency at the time of the offense.

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[12] The allegation reads in part:

> Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors including, but not limited to, three statutory mitigating factors under Tennessee law, i.e., that Mr. Thompson suffered from substantial mental disorders and demonstrable physical brain damage which made him unable to conform his behavior to the law; left him under the influence of extreme mental or emotional disturbance, [and] substantially impaired his ability to appreciate the wrongfulness of his conduct at the time of the offense.

Again, in a separate allegation, Thompson alleged:

> Counsel failed to obtain adequate expert assistance, including confidential psychological, neuropsychological, and neurological experts.

In their Rule 26(f) [Fed. Rule Civ. P. 26(f)] report to the court, Thompson contended that discovery should be had regarding those matters alleged in his petition and such other federal constitutional errors that might be discovered during habeas proceedings. The Warden objected to discovery. On November 2, 1998, the magistrate judge issued an order allowing counsel to take the depositions of three mental health experts who had treated Thompson during his incarceration. The magistrate judge noted in pertinent part that the petition for writ of habeas included an allegation that executing the petitioner would violate the Eighth Amendment because he is incompetent to be executed. At the same time, the magistrate judge authorized the Warden to take the depositions of Thompson's two experts, psychologist Faye Sultan, and neuropsychologist Barry Crown.

On November 30, 1998, the district court affirmed the magistrate judge's order. The district court also expanded the scope of discovery:[13]

[13] On February 12, 1999, Thompson filed an *ex parte* motion for temporary mandatory restraining order, for preliminary injunctive relief, for permanent mandatory injunction, for an order finding petitioner incompetent to proceed, continuance, and to toll. Attached to that affidavit is the Declaration of Dr. Faye Sultan, a clinical psychologist with a Ph.D in clinical psychology from the University of Georgia. In that declaration Sultan stated that she had examined Thompson on a periodic basis since 1998. In Sultan's opinion as of February 1999, Thompson met all of the diagnostic criteria for major mental illness Schizophrenia, Episodic, with Interepisode Residual Symptoms. Sultan's affidavit does not discuss Thompson's mental state at the time of the offense. Rather, its focus was to address his then-current mental condition and alleged inability to proceed with the appeal process.

Thompson filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 60(b) for the purpose of allowing him to supplement the record with the deposition and accompanying record of Dr. Faye E.

(Continued on following page)

> Additionally, if the facts are developed to show that petitioner's mental health should have been introduced as mitigating evidence, petitioner may be entitled to relief. . . . After a cursory review of the numerous volumes of state documents involved in this case, it appears that Thompson has alleged a factual basis for some of his claims and the magistrate judge so found. For example, petitioner claims trial counsel failed to properly investigate his mental health history and present mitigating evidence at trial and sentencing. Petitioner contends that he had two serious head injuries and intermittent bizarre and delusional thought patterns and witnesses to testify to such, and this mitigating evidence should have been introduced. Furthermore, petitioner contends that his institutional records reveal a diagnosis of schizophrenia with problems of auditory and visual hallucinations and paranoid ideation. If petitioner proves these factual allegations, he may be entitled to relief.

The Warden deposed Dr. Crown. Crown testified that he is a licensed psychologist in the State of Florida with a Ph.D. from Florida State University, and that he limits his practice to the areas of clinical and forensic psychology and neuropsychology. Crown met with Thompson for two and one-half to three hours on June 12, 1998. In that time he took a brief history and administered tests.[14] Based

Sultan, Ph.D. The district court denied it as time-barred by order dated March 7, 2001.

[14] Crown testified that the tests included:

> The Shipley Institutes of Living Scale; the G-F-W Auditory Selective Attention Test; the Category Test; the Kaufman Neuropsychological Assessment Procedure; the Luria Memory Test; the Reitan-Indiana Aphasia Screening Test; the

(Continued on following page)

upon those test results and the reports of the mental health professionals treating Thompson for the last fourteen years, Crown opined that Thompson suffered from some form of organic brain damage, which was secondary to a "schizo-affective disorder-bipolar subtype." Crown also found that Thompson had a significant auditory processing deficit, which means he is easily distracted by auditory stimuli. He further stated that some of the test results led him to conclude that there was some sort of organic brain damage.[15] (R91 p.24). However, Crown stated that he was not able to make an assessment of the severity of the damage and that he did not intend to. (R 91 p.28)

Crown did, however, conclude that Thompson was competent at the time of the examination on June 12, 1998. (R91 p. 47)

Significantly, Crown testified that he was only asked to render an opinion as to Thompson's competency at the time of the examination and not asked to render an opinion as to Thompson's mental status at the time of the offense or trial.

Rey-Osterreith Complex Figure Test; the Trailmaking Test; Word Generation, F/A/S; Finger Oscillation Test; and the Wisconsin Card Sorting Test.

(Dct. R. vol. 2 Exh. 91 p18)

[15] Crown defined "organic brain damage" as "damage to the brain that is of a physical nature, and that physical nature may be anatomic, it may be electrical, or it may be metabolical." (R.91 p. 40) When asked if he knew the causation for Thompson's brain damage, he replied: "I don't specifically know the causation. I believe it may be secondary to his thought disorder since we know that in people with thought disorders that the thought disorder itself may either be caused by or may result in some damage to the brain." (R.91 p. 40-41).

In rebuttal, the Warden offered the testimony of Dr. Theodore Blau.[16] Blau testified that he did not observe any indications of organic brain damage on the test he administered. However, Blau also indicated that he had not "come to an opinion that [he] would consider a complete profession opinion," and that the test he conducted "would be called at best screening." On the other hand, Dr. Blau stated that he would only want to conduct other neuropsychological tests if "there was a reason," such as a referral, observation or any difficulties during the testing that Thompson showed signs of left-hemisphere deficit.

The district court granted summary judgment to the Warden on Thompson's ineffective assistance of counsel claim:

> Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). . . . Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.

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[16] Only limited portions of Dr. Blau's deposition testimony were filed with the district court.

> Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial. Additionally, the record shows that trial counsel did reasonably investigate Thompson's background and mental health history.

The district court held that Thompson was not entitled to an evidentiary hearing.

The district court granted summary judgment to the Warden on all of Thompson's claims, dismissed Thompson's petition for writ of habeas corpus, and denied any application of a certificate of appealability. This Court granted a certificate of appealability on September 12, 2000. Four issues are presented for review.[17]

III. Analysis

Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 326-27 (1997). Under the AEDPA, a federal court may not grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits unless (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1) (1994 & Supp. VII), or (2) the state court's decision "was based on an unreasonable application of the facts in light of the evidence presented

[17] Thompson indicated that he has consolidated the seven issues upon which the certificate of appealability was granted into four issues.

in the State court proceedings." *Id.* § 2254(d)(2) (1994 & Supp VII).

A state court's legal decision is "contrary to" clearly established federal law under § 2254(d)(1) "if the court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court on a materially indistinguishable set of facts." *(Terry) Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). An "unreasonable application" occurs when "the state court identified the correct legal principle from [the Supreme] Court's decisions but unreasonably applies it to the facts of the prisoner's case." *Id.* Under this standard, a state court decision is not unreasonable simply because the federal court concludes that the state decision is erroneous or incorrect. *Id.* at 411. Rather, the federal court must determine that the state court decision is an objectively unreasonable application of federal law. *Id.* at 410-12. Factual findings by state courts are presumed correct. 28 U.S.C. § 2254(e)(1).

A. Appropriate Standards of Review

1. Adjudication on the Merits

First, Thompson argues that the district court erred when it reviewed Thompson's claims under the "all reasonable jurists" standard that was rejected by the Supreme Court in *Williams,* 529 U.S. 362. As a threshold matter, he asserts that the state court's decision on his ineffective assistance of counsel claim did not constitute an "adjudication" within the meaning of § 2254(d) because he was denied funds for expert assistance during his post-conviction proceeding and thus denied a "full opportunity

to litigate the issues" in state court, and the state court "failed to render a considered deliberation of the issues." Consequently, according to Thompson, § 2254(d) was inapplicable and the district court should have reviewed his claims under the pre-AEDPA de novo standard of review.

Thompson's argument touches upon a inter-circuit debate regarding the proper interpretation of "adjudicated on the merits" as that term is used in § 2254(d)(1). *See, e.g., Washington v. Schriver,* 255 F.3d 45, 52-54 (2d Cir. 2001) (discussing various approaches by the circuits; citing cases); *see also Schoenberger v. Russell,* 290 F.3d 831, 837-41 (6th Cir. 2002) (Keith, J., concurring). This debate centers largely on whether a federal constitutional claim is "adjudicated on the merits" and is therefore subject to the AEDPA's deferential standard of review, if the state court neither cited nor applied federal law. *See Washington,* 255 F.3d at 52-53; *see also Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir. 1997) (looking to whether a state court decision disposes of a claim substantively or procedurally).

Although this Court has "not directly analyzed AEDPA's requirement that a state court adjudicate federal claims 'on the merits' in order to warrant our deference," *Schoenberger,* 290 F.3d at 841 (Moore, J., concurring), "in *Harris v. Stovall,* . . . [18] we specifically held that the result of a state court's decision controls when the state court fails to explain its reasoning." *Id.* That is, "we stated that we could not 'grant relief unless the state court's result is not in keeping with the strictures of the AEDPA.'" *Id.* (quoting *Harris,* 212 F.3d at 943). Thus, in *Harris,* we

[18] 212 F.3d 940 (6th Cir.2000), *cert. denied,* 532 U.S. 947 (2001).

focused on the result of the state court decision relevant to the petitioner's due process claim since no state court had addressed it. And in *Doan v. Brigano,* 237 F.3d 722 (6th Cir. 2001), we held that the "contrary to" rather than the "unreasonable application" prong of § 2254(d)(1) governs because the state court "did not, as the Supreme Court defined an unreasonable application, correctly identify the governing legal principle only to unreasonably apply that principle to the particular facts of the case at hand." *Id.* at 730.[19] In *Schoenberger,* we reviewed the petitioner's claim that admission of certain testimony violated his rights of due process and to a fair trial, which the Ohio Court of Appeals did not directly address, under the following standard: "In the absence of a state court decision, we conduct an independent review of federal law to determine if the state court either contravened or unreasonably

[19] The Second Circuit observes that our view of § 2254's unreasonable application prong in *Doan,* namely that an "unreasonable application" analysis cannot be performed on a state court decision that fails to identify a state prisoner's federal claim, is in tension with our conclusion in *Harris* that when a state court decides a constitutional issue by form order or without discussion, a habeas court should focus on the result and perform an "unreasonable application" analysis. *See Sellan v. Kuhlman,* 261 F.3d 303, 313 n.5 (2d Cir. 2001). However, Judge Moore, the author of *Doan,* explained the apparent contradiction as follows:

> *Harris* denied habeas relief because the Supreme Court had not clearly established a defendant's right to a free copy of a transcript of his co-defendants' previous trial for the impeachment of witnesses in the defendant's trial. *Harris,* 212 F.3d at 945. In contrast, the defendant in *Doan* had a clearly established Sixth Amendment right to a fair and impartial jury. Therefore, the language in *Harris* about the state court's unreasonable application of federal law was dicta, and *Doan's* "contrary to" analysis controls.

Schoenberger, 290 F.3d at 842 (Moore, J., concurring).

applied clearly established federal law." *Schoenberger,* 290 F.3d at 835 (citing *Harris,* 212 F.3d at 943).

In this case, Thompson asserted in state post-conviction proceedings that counsel was ineffective for failing to adequately investigate prior head injuries. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on two grounds. First, the court held that Thompson had failed to establish prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984). *Thompson,* 958 S.W.2d at 162, 165. Second, the court found that trial counsel's tactical decision to emphasize Thompson's positive qualities at trial, rather than to suggest brain damage, was a reasonable trial strategy based upon adequate investigation. *Id.* In other words, the state court analyzed Thompson's ineffective assistance of counsel claim under *Strickland,* rendering a substantive analysis. Thus, the state court decision is not an unexplained, summary dismissal of a federal claim. Thompson's contention is utterly without merit.

2. Reasonable Jurists Standard

Second, Thompson argues that the district court's application in its § 2254(d)(1) analysis of the "debatable among reasonable jurists" standard, subsequently rejected by the Supreme Court in *Williams v. Taylor,* 529 U.S. 362, requires remand for reconsideration of his claims under the appropriate standard.[20] Although Thompson is correct that the standard applied below is no longer appropriate

[20] The district court rendered its decision prior to *Williams.* Thus, its reliance on the "all reasonable jurists" standard was proper at the time.

in light of *Williams,* remand is unnecessary because we must, in reviewing the matter de novo, rely solely on the Supreme Court's decision in *Williams* for the proper standard under § 2254(d). Remand is unnecessary unless the district court's decision cannot be upheld under that standard. *See, e.g., Harris,* 212 F.3d at 942 (affirming the denial of habeas relief even though the district court incorrectly applied standards under the AEDPA). Further, this court can affirm a decision of the district court on different grounds. *See Hammon v. DHL Airways, Inc.,* 165 F.3d 441, 445 (6th Cir. 1999).

B. Ineffective Assistance

Thompson argues that he received ineffective assistance of counsel in both the guilt and sentencing phases of his capital trial because counsel failed to investigate and present evidence regarding Thompson's mental illness and social history and failed to present evidence in support of a life sentence. Specifically, Thompson contends that trial counsel's decision to employ a psychologist at trial, rather than a psychiatrist, was objectively unreasonable under *Strickland.* He also claims that counsel failed to interview and present testimony of witnesses who could have testified about a "bizarre change" in Thompson's behavior after he graduated from high school that may have signaled the onset of mental illness.

In *Strickland,* the Supreme Court announced a two-part test for evaluating ineffective assistance of counsel claims. First, counsel's performance must have been deficient in that it fell below an objective standard of reasonableness. Second, there must be "a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Strickland,* 466 U.S. at 687-94. At the same time, the *Strickland* Court cautioned that judicial scrutiny of defense counsel's performance must be "highly deferential." *Id.* at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Because the Tennessee state court correctly stated the *Strickland* standard, the question we must decide is whether the state court unreasonably applied *Strickland* in this case. Under the AEDPA, it is not enough to convince the court in its independent judgment that the state courts applied *Strickland* incorrectly. Rather, a petitioner must show that the state courts applied *Strickland* in an objectively unreasonable manner. *Cone v. Bell,* 122 S. Ct. 1843, 1852 (2002).

A state court's conclusion that counsel rendered effective assistance is not a finding of fact binding on a federal habeas court. *Strickland,* 466 U.S. at 698. Both prongs of the *Strickland* standard involved mixed questions of law and fact. *Id.* We therefore review both the state court ruling and the district court decision *de novo. Carter v. Bell,* 218 F.3d 581, 591 (6th Cir. 2000).

1. Failure to Hire a Psychiatrist

Thompson contends that he received ineffective assistance of counsel at his capital trial because counsel failed to investigate his mental health and secure assistance from a psychiatrist.

To begin, to the extent that Thompson is claiming that trial counsel were ineffective because they failed to hire a *psychiatrist* rather than a psychologist, this argument is both procedurally defaulted and forfeited because it represents a transfiguration of Thompson's claim in the state courts and the district court that counsel failed to hire "adequate expert assistance" regarding his head injuries during his youth and his competency at the time of the crime.[21] Furthermore, post-trial counsel have themselves not consulted psychiatrists in their attempt to establish that Thompson suffers from organicity and mental illness. State post-conviction counsel contacted Dr. Gillian Blair, a clinical psychologist. Thompson's federal habeas counsel, the Federal Community Defender Services

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[21] Thompson's amended petition for post conviction relief provides in pertinent part:

> Counsel failed to request and obtain *adequate expert and investigative assistance* regarding Gregory Thompson's head injuries during his youth, and failed to obtain "adequate expert assistance" regarding Gregory Thompson's competency at the time Gregory Thompson made incriminating statements to state authorities.

In his federal habeas petition, Thompson averred that:

> Counsel was ineffective for failing to fully investigate and present relevant evidence of Mr. Thompson's mental health history, and to secure *adequate expert assistance to defend Mr. Thompson including psychologists, neuropsychological, and/or neurological experts to establish valid mitigating factors.* . . .
>
> . . .
>
> Counsel failed to obtain *adequate* expert assistance, including confidential *psychological, neuropsychological, and neurological experts.*

(Emphasis added.)

of Eastern Tennessee[22], consulted Faye Sultan, a psychologist, and Barry Crown, a neuropsychologist. It is with no small irony that we note that in attempting to claim that Thompson was constitutionally entitled to the services of a psychiatrist, post-trial counsel did not bother to obtain one themselves.

More fundamentally, even if the issue had been raised, Thompson did not establish that he was constitutionally entitled to expert psychiatric assistance under *Ake v. Oklahoma,* 470 U.S. 68 (1985), such that counsel's failure to attain one constituted ineffective assistance. In *Ake,* the Supreme Court held that, "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ake,* 470 U.S. at 74, 83. The *Ake* court also stated that a similar conclusion was required in the context of a capital sentencing proceeding, when the state presents psychiatric evidence of the defendant's future dangerousness. *Id.* at 83. At the same time, the *Ake* majority emphasized that its ruling was limited to cases in which the defendant's mental condition was "seriously in question" upon the defendant's "threshold showing." *Id.* at 82. Furthermore, the Court held that the state was obliged merely to provide one competent psychiatrist, and that it could choose that psychiatrist. In other words, the defendant's right does not include the right to a psychiatrist of his choice. *Id.* at 83 ("That is not to say, of course, that the indigent defendant has a constitutional right to choose a

[22] We note that Thompson is represented by the same office in this appeal.

psychiatrist of his personal liking or to receive funds to hire his own.").

This Court has interpreted *Ake* to recognize that in addition to the right to a psychiatrist during the guilt phase, an indigent defendant is constitutionally entitled to "psychiatric or psychological" assistance during the sentencing phase "1) if the defendant's sanity was a significant issue during the trial, or 2) defendant is on trial for his life and the state first presents psychiatric evidence of future dangerousness." *Skaggs v. Parker,* 235 F.3d 261, 272 (6th Cir. 2000) (quotation omitted), *cert. denied,* 122 S. Ct. 322 (2001). Neither of these prerequisites apply to Thompson. Counsel dropped the defense after two separate mental evaluations found him competent. The State did not present psychiatric evidence at trial or at its case-in-chief at sentencing.[23] Nor has Thompson offered any evidence of legal insanity at the time of offense. Thus, trial counsel cannot be deemed ineffective for failing to obtain a psychiatrist.

In any event, trial counsel sought a psychiatric evaluation of Thompson, and the court ordered one. Under *Ake,* this is all Thompson would have been entitled to anyway. Although Parsons stated that he had no confidence in the conclusion rendered by MTMHI, Parsons' feeling is not proof of anything, and there is nothing in the state or federal record to undermine the evaluations rendered by MTMHI staff as to Thompson's competency at the time of the murder and at trial. As we stated in *Martin v. Mitchell,* 280 F.3d 594, 614 (6th Cir. 2002), *petition for*

[23] The state introduced a redacted portion of Thompson's evaluation at MTMHI though Watson, a rebuttal witness.

cert. filed, June 25, 2002 (No. 02-5185), "[w]e have never found counsel to be ineffective solely because the expert used was on the State payroll."

This leaves the issue that is properly before us, whether trial counsel failed to hire *adequate* expert assistance. As illustrated above, the record reflects that trial counsel investigated Thompson's mental health and that he received expert assistance to attempt to establish valid mitigating factors. The record shows that trial counsel were aware from the outset of Thompson's prior head injuries and inappropriate behavior, and that they investigated possible mental illness or defect. They requested a competency evaluation. Thompson was evaluated for thirty days by a team of experts. The MTMHI team found no mental illness, mental defect, or insanity. Counsel also had Copple, a clinical psychologist and former professor of psychology at Vanderbilt, evaluate Thompson. Copple found no evidence of mental illness.

On appeal, Thompson seeks to undermine Copple's testimony by casting him as an "industrial psychologist," and therefore somehow unqualified to make psychological evaluations.[24] Copple's trial testimony belies this diminution of Copple's abilities. Copple himself testified on direct and cross examination that he is a clinical psychologist, and that he did not hold himself out as an industrial psychologist. Although he performs vocational evaluations and evaluations for social security applicants, he stated

[24] The American Psychological Association describe industrial psychologists as follows: "Industrial/organizational psychologists apply psychological principles and research methods to the work place in the interest of improving productivity and the quality of work life." http://www.apa.org/students/brochure/subfields.html.

that the latter are not industrial psychology, but clinical psychology, from the standpoint of making a psychological evaluation of whether someone can continue working. Significantly, none of Thompson's experts faulted the testing that was performed.

Moreover, not one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial. Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stating simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. Similarly, neither Crown nor Sultan ever expressed an opinion that Thompson was mentally ill at the time of the crime. In fact, Crown stated that he was not asked to render such an opinion. *Cf. Mackey v. Dutton,* 217 F.3d 399, 409 (6th Cir. 2000) (holding that the petitioner failed to establish that an expert's testimony would have been favorable to his insanity defense because the expert's report failed to speak to the ultimate issue – legal insanity at the time the offenses were committed), *cert. denied,* 531 U.S. 1087 (2001). On the other hand, Crown found Thompson competent in June 1998, which is consistent with Copple's findings and the MTMHI evaluation in 1985.

Also, as the district court found, Thompson failed to submit any medical records or proof *to any court* that he actually sustained the alleged head injuries or that they resulted in any permanent damage. Further, he has never submitted *to any court* any proof that he suffered from severe mental illness at the time of the crime. Thompson

claims that trial counsel failed to discover his father had a history of severe mental illness, but Thompson have [sic] never offered any proof of this either.

Counsel has now had numerous opportunities via expert testimony to establish that Thompson suffered from organic brain disease or mental illness at the time of the crime. And yet, at each opportunity, counsel fails to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime. In essence, counsel is attempting to rely on, *as proof,* two inferences: 1) because Thompson allegedly suffered head injuries, he must have suffered brain damage, and 2) because he is currently suffering from schizo-affective disorder, he must have been suffering from mental illness at the time of the crime. But inferences are not proof, as even Thompson's experts seem to recognize, for each and every one fails to automatically take the leap from these inferences to the conclusion that he was mentally incompetent at the time of the murder. However, absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist. As we held in *Lorraine v. Coyle,* 291 F.3d 416, 436 (6th Cir. 2002), "[i]t simply cannot be said that trial counsel's conduct fell below an objective standard of reasonableness under *Strickland* simply because the leads [of possible brain damage] led to nowhere."

Like trial counsel in *Lorraine,* Thompson's attorneys actually pursued a lead of organic brain damage or mental defect. Like counsel in *Lorraine,* "[t]hey cannot be deemed ineffective, since even at this late date, there is no medical *proof* of such a condition [at the time of the crime]." *Id.* at 439. *See also Martin,* 280 F.3d at 614-15 (rejecting the

petitioner's ineffective assistance at mitigation because the petitioner had not pointed to mitigating psychological evidence that should have been presented and therefore no prejudice was shown); *Campbell v. Coyle,* 260 F.3d 531 (6th Cir. 2001) (rejecting the petitioner's ineffective assistance at sentencing claim based on counsel's alleged failure to discover that he had post traumatic stress disorder because the petitioner failed to point to anything in the record showing that he suffered from it), *cert. denied,* 122 S. Ct. 1448 (2002). *Cf. Williams,* 529 U.S. at 395-98 (finding ineffective assistance where trial counsel failed to investigate and introduce available evidence showing that the petitioner was borderline mentally retarded); *Coleman v. Mitchell,* 268 F.3d 417, 449-53 (6th Cir. 2001) (finding ineffective assistance for failure to investigate and present available proof of the petitioner's borderline mentally retarded I.Q. and various psychological and hospital reports revealing that at the time of trial the petitioner had a borderline personality disorder), *cert. denied,* 122 S. Ct. 1639, (2002); *Glenn v. Tate,* 71 F.3d 1204, 1205 (6th Cir. 1996) (finding ineffective assistance of counsel where counsel failed to investigate and present evidence that the petitioner suffered from global brain damage sustained before he was born; stating that "[e]xpert testimony that the petitioner's brain function was organically impaired would have been readily available if the petitioner's lawyers had sought it").

Skaggs, in particular, demonstrates why Thompson failed to demonstrate cause. In that case, we found that trial counsel were ineffective at the penalty phase because they retained a fraudulent psychologist whose testimony was often incoherent and rambling and who failed to present a realistic view of the petitioner's mental status.

In several motions for a new trial, Skaggs offered the evaluations of two psychiatric experts who examined the petitioner in preparation for his federal habeas petition. *Skaggs*, 235 F.3d at 265. One of the experts, a certified psychologist, stated that Skaggs was mildly retarded and functioned at the level of a twelve- or thirteen-year-old. The other expert, a neuropsychologist, determined that Skaggs had an I.Q. of 64, which indicated that he was borderline mentally retarded. That expert also stated that the fraudulent psychologist's testimony was "'so far below the standard of care as to totally misrepresent Mr. Skaggs to the jury.'" *Id.* The neuropsychologist's report stated that Skaggs "suffer[ed] from significant compromise in almost all areas of cognitive function . . . and that the results of comprehensive neuropsychological assessment clearly reflect a pattern of results consistent with some form of organic brain syndrome." *Id.* at 273. This Court held that, based on this information, it was reasonable to assume that the jury might have found the statutory mitigating circumstance of Skaggs's impaired ability to appreciate the criminality of his conduct as a result of mental illness or retardation. *Id.* at 274. We therefore concluded that counsel's failure to present proof of Skaggs's mild mental retardation and mental capacity constituted prejudice because it was the one topic which may have convinced the jury that the death sentence was not justified. *Id.* at 271-72.

Carter is also instructive. There we found cause under *Strickland* based on trial counsel's failure to investigate, discover, and present mitigating evidence. At an evidentiary hearing in federal court, Carter presented evidence of mitigating circumstances that he alleged his trial counsel should have presented. This included evidence

that Carter's childhood home was violent and unstable, that his mother and sister were both hospitalized in mental health institutions, and that his IQ was 79-89. *Carter*, 218 F.3d at 593. Significantly, Carter also presented the evaluation of a clinical psychologist who, eight years after the murder at issue, determined that Carter had psychotic symptoms, and thought disorders consistent with paranoid schizophrenia or an organic delusional order, and further stated that "although Carter may have not appeared delusional to a lay-person at the time of his trial, a trained professional would have been able to recognize mental compromise and abnormal personality traits in excess of an antisocial personal disorder." *Id.* at 593-94.

By contrast, Thompson has not presented any evidence of incompetence at the time of the crime or trial in either the state or federal proceedings. As previously noted, none of Thompson's experts have stepped up to the plate on the key issue of Thompson's competence at the time of trial.

As the Tennessee Court of Criminal Appeals held, there is no prejudice because, "[t]he petitioner has failed to establish that the head injuries had any effect upon his mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Thompson*, 958 S.W.2d at 165. Moreover, as the foregoing litany of cases shows, this Court will not find ineffective assistance of counsel unless the record establishes that there is actual mitigating evidence that was not presented.

Indeed, although the state court ruled on the prejudice prong of *Strickland,* its ruling is equally sustainable under the cause prong of *Strickland* because trial counsel's decision to employ a clinical psychologist at trial was not objectively unreasonable. Further, as the Tennessee Court of Appeals concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* Nor can there be prejudice, because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime. Thus, the state court's decision holding that counsel were not ineffective under the Sixth Amendment is not an unreasonable application of *Strickland.*

2. Witness Testimony

Thompson also contends that counsel failed to interview and present testimony of witnesses who could have testified about a "bizarre change" in Thompson's behavior after he graduated from high school that might have signaled the onset of mental illness and to otherwise present his personal and social history. Specifically, Thompson claims that trial counsel failed to interview and call as witnesses Nora Jean Walton, Joanne McNamara, and Arlene Cajulao.[25] Thompson failed to properly present these claims in the state post-conviction proceedings. The Tennessee Criminal Court of Appeals found:

[25] In his brief Thompson recites what these witnesses "would have testified" to had counsel "conducted a proper social history." This purported testimony is unsupported by any record proof, and violates Fed. R. App. 28.

> When the claim of ineffectiveness is predicated upon the failure to present potential witnesses, their testimony should be offered at the post-conviction hearing. . . . Here, because none of the witnesses testified at the hearing, the petitioner was simply unable to show prejudice. We cannot speculate upon the usefulness of these witnesses without the information they could have provided.

Thompson, 958 S.W.2d at 163-64. Thompson further failed to submit affidavits from witnesses who could have testified to his alleged "bizarre behavior" in his federal habeas action. Thus, "Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute." The state court did not err in concluding that Thompson failed to state an ineffective assistance of counsel claim on this basis, and the district court properly granted summary judgment. *Cf. Martin,* 280 F.3d 594.

Although Cajulao testified, Thompson claims that she was not informed about the nature of the penalty phase testimony and only testified about things she felt would help Thompson. However, as the record reflects and the Tennessee Criminal Court of Appeals found, counsel were aware of the potential dangers inherent in allowing Cajulao to testify, but made a tactical decision to present her positive testimony as part of their strategy to "humanize" Thompson. The state court's ruling is not an unreasonable application of *Strickland,* which emphasized that courts are not to second-guess strategic decisions by counsel.

The record reflects that counsel conducted an adequate investigation into Thompson's background. Prior to

trial, both counsel traveled to Thompson's home town. They interviewed relatives, teachers, and neighbors. Counsel knew of Thompson's head injuries and followed up by requesting and obtaining expert assistance. Although they did not obtain his medical records, Watson and Copple were each aware of these injuries prior to his evaluation of Thompson. (Apparently habeas counsel never obtained the records either.) Through the lay witnesses, the jury was provided with an image of Thompson as a caring, good person. *Cf. Greer v. Mitchell,* 264 F.3d 663, 676-78 (6th Cir. 2001) (finding ineffective assistance of appellate counsel for failing to raise ineffective assistance of trial counsel where trial counsel failed to interview family members, failed to review school records, and failed to call any mental health experts; and cases cited therein), *cert. denied,* 122 S. Ct. 1323 (2002).

Moreover, to the extent that Thompson faults counsel for not presenting evidence of "bizarre" behavior, it should be noted that Cajulao testified to Thompson's increasing paranoia and erratic behavior after the crowbar attack. The jury was therefore given some indication that the head injuries may have affected Thompson's behavior. There is no prejudice.

3. Strategy

Thompson claims that trial counsel adopted a completely indefensible strategy of presenting Thompson as a good, caring person with a need to "nurture." We disagree. In this case, trial counsel were faced with a client who had committed a senseless crime and admitted to it. Further, his upbringing had been fairly normal. *Cf. Bell,* 122 S. Ct. at 1847-53 (holding that counsel decision not to present

any mitigating evidence at sentencing and thereby preventing the prosecutor from presenting any rebuttal was not deficient under *Strickland* because counsel was "faced with the formidable task of defending a client who had committed a horribly brutal and senseless crime," who had admitted to the killing, and who had a relatively normal upbringing). Nor could they present evidence of mental illness or defect. As the Tennessee Court of Criminal Appeals held, trial counsel could have pursued a strategy other than emphasizing his good qualities, and prevented the state from introducing some negative evidence about him. But there is no indication that another strategy would have been more effective, and the failure to present evidence of Thompson's prior good behavior might itself qualify as ineffective assistance. *Cf. Cone v. Bell,* 243 F.3d 961, 977-79 (6th Cir. 2001) (holding that counsel's failure to present any mitigating evidence or to ask the jury to spare the defendant's life constituted ineffective assistance, reversing death sentence); *rev'd* 122 S. Ct. 1843 (2002) (holding that counsel could have told jury of the defendant's Bronze Star decoration in Vietnam and his expression of remorse, but such strategy did not so clearly outweigh counsel's choice to waive oral argument to prevent lead prosecutor from arguing that it could be deemed objectionably unreasonable under *Strickland*).

Thus, as long ago cautioned in *Strickland,* and recently reemphasized in *Bell,* an attorney's conduct is entitled to a strong presumption that it falls within a wide range of reasonable professional assistance. *Bell,* 122 S. Ct. at 1854. As in *Bell,* "[g]iven the choices available to [Petitioner's] counsel . . . we cannot say that the court's application of *Strickland's* attorney-performance standard was objectively unreasonable." *Id.*

C. Evidentiary Hearing

Thompson asserts that the district court erred in denying his petition without an evidentiary hearing on three specific claims: (1) ineffective assistance of counsel; (2) competency at the time of the offense to stand trial, and (3) an alleged *Brady/Giglio* violation. Thompson further contends that the State withheld exculpatory evidence which clearly supported his claim of serious mental illness and presented false evidence regarding Thompson's mental health, during trial and post-conviction proceedings.

The AEDPA imposes express limitations on the ability of a petitioner to obtain an evidentiary hearing in federal court. In *(Michael Wayne) Williams v. Taylor,* 529 U.S. 420 (2000), the Supreme Court instructed that a habeas court presented with a request for an evidentiary hearing must first ascertain whether the "applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2); *Williams,* 529 U.S. at 433 (interpreting clause as evidencing congressional intent to codify standard of diligence announced in pre-AEDPA decision, *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992)). If the applicant did not "fail to develop" the claim in state court, the statute does not bar an evidentiary hearing. If an "applicant has failed to develop the factual basis of a claim in State court proceedings," 28 U.S.C. § 2254(e)(2) prohibits a federal court from conducting an evidentiary hearing on that claim unless the applicant demonstrates that

> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The test for "fail to develop" is defined as a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel" in his or her attempts to discover and present a claim in state court proceedings. *Williams,* 529 U.S. at 432. Diligence, for purposes, of § 2254(e)(2), depends upon "whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 435.

Thompson claims that the district court erred in denying him an evidentiary hearing because he did not fail to develop the factual basis of his claims in state court. Thompson claims that he made diligent efforts to develop the fact of his claims in state court "by requesting resources to conduct an investigation and resources to obtain expert assistance and by requesting an evidentiary hearing in state court." He claims that he was denied funding for mental health experts and investigative services at trial and during state post-conviction proceedings and argues that fault for any deficiency in the state court record belongs to the State.

Even if we assume that Thompson did not "fail to develop" these claims below (and we do not make that

assumption), Thompson is still not entitled to an evidentiary hearing under § 2254(e) because he failed to present any evidence demonstrating a genuine issue of material fact as to his claim of incompetence at the time of the offense and at trial. This is true even though the district court granted him further discovery under Habeas Rule 6. Absent such a showing, there can be no cause or prejudice under *Strickland* and therefore no need for an evidentiary hearing. *Cf. Hutchison v. Bell*, ___F.3d___, 2002 WL 1988196, at *8 (6th Cir. Aug. 29, 2002) (holding that the petitioner failed to develop the factual basis for his claims and that absent a record of the evidence that he would have presented at a separate trial, it was impossible to conclude that the state court unreasonably determined that he was not prejudiced). Furthermore, if Thompson did fail to develop, his failure to point to actual mitigating evidence that should have been presented, i.e. his failure to show prejudice, establishes that he has not met the requirement of § 2254(e)(2)(B). *See Martin*, 280 F.3d at 615.

Finally, concerning an alleged *Brady/Giglio* violation, Thompson failed to identify below, or in this court, any evidence that was withheld from him at trial.

In short, Thompson's argument is without merit. We therefore affirm the district court's holding, and specifically adopt the reasoning of the district court as to these claims.

IV. Conclusion

For all of the foregoing reasons, the judgment of the district court denying Thompson's petition for writ of habeas corpus is **AFFIRMED**.

CONCURRENCE

KAREN NELSON MOORE, concurring in the result. I concur in the court's decision to affirm the district court's denial of Thompson's petition for the writ of habeas corpus. However, I write separately to state that in regard to Thompson's claim that his counsel was constitutionally ineffective at sentencing, I reach the decision to deny his petition solely on the basis of the facts in this case.

Thompson claims that his trial counsel was constitutionally ineffective in presenting mitigating factors at his sentencing because his counsel did not present appropriate psychological evidence of his mental condition. Both Thompson and the dissent contend that had Thompson's trial counsel hired a more appropriate psychological or psychiatric expert, they would have been able to present evidence of Thompson's mental illness, or at least of his deteriorating mental condition. While I have sympathy for the view expounded in the dissent regarding the general propriety of using industrial psychologists as expert witnesses in capital cases, I cannot conclude that Thompson's trial counsel was constitutionally ineffective in hiring Dr. Copple in this case because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime. Without any evidence that a more appropriate psychological or psychiatric expert would have testified to Thompson's mental illness or his deteriorating mental condition, I cannot conclude that the hiring by Thompson's trial counsel of Dr. Copple – however flawed

his testimony seems in hindsight – constituted constitutionally ineffective assistance of counsel.

DISSENT

CLAY, Circuit Judge, dissenting. Because the state court's conclusion that Thompson's trial counsel were not constitutionally ineffective was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), I would reverse the district court's judgment granting summary judgment to Warden Bell and remand to the district court with instructions to issue a writ of habeas corpus vacating Thompson's death sentence unless the State of Tennessee conducts a new penalty trial proceeding within 180 days of remand.

I. Standard of Review and Governing Law

I agree with the lead opinion that Thompson's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, as amended Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), 28 U.S.C. § 2254(d). AEDPA provides that an application for a writ of habeas corpus on behalf of an individual incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the

state court proceeding." 28 U.S.C. § 2254(d). In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court interpreted this provision of AEDPA to require a federal court to find a violation of law "clearly established" by holdings of the Supreme Court as of the time of the relevant state court decision. The Supreme Court in *Williams* held that a state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 413. The Court also stated that a decision by a state court will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.; see also Bell v. Cone*, 535 U.S. 685, ___, 122 S. Ct. 1843, 1850 (2002).

In *Williams*, the Court held that the petitioner was entitled to federal habeas corpus relief on his claim that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial attorneys did not investigate and present substantial mitigating evidence during the sentencing phase of his capital murder trial. 529 U.S. at 396. In particular, the Court found that while trial counsel were competent during the guilt phase of the trial, they rendered ineffective assistance at the sentencing phase by their failure to investigate "Williams' nightmarish childhood" and to present evidence that "Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school" or concerning his commendable behavior in prison. *Id.* at 395-96. Because

Williams "raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence," the Court in *Williams* concluded that "the Virginia Supreme Court rendered a 'decision that was clearly contrary to, or involved an unreasonable application of, clearly established Federal law,'" thus entitling Williams to habeas relief. *Id.* at 399.

In the matter at hand, Thompson also claims that he was entitled to habeas corpus relief, principally because he was denied the effective assistance of counsel under the Sixth Amendment of the United States Constitution.[1] Claims of ineffective assistance of counsel are governed by the Supreme Court's two-prong test set forth in *Strickland.* The first prong of the test is whether counsel's performance fell below an objective standard of reasonableness, whereby "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. Review of trial counsel's performance is highly deferential. *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the

[1] The lead opinion's contention that Thompson procedurally defaulted his claim that trial counsel were ineffective because they failed to hire a psychiatrist instead of a psychologist is unsupported inasmuch as this claim is inherently implied by Thompson's petitions for relief. More importantly, however, trial counsel's failure to hire any competent psychological assistance whatsoever provides a basis for granting Thompson relief, as will be demonstrated.

time." *Id.* In this regard, defense counsel must reasonably investigate the facts of the case or reasonably determine that an investigation is not necessary, or else the performance is deficient. *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir. 1997). In addition, as this Court pointed out in *Combs v. Coyle*, 205 F.3d 269, 289-90 (6th Cir. 1997),

> *Strickland* instructed that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.63(2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052. ABA Standard 4-1.2(c) states that "[s]ince the death penalty differs from othr criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making *extraordinary* efforts on behalf of the accused." ABA Standards for Criminal Justice Prosecution Function and Defense Function 120 (3d ed. 1993). (Emphasis supplied).

The second prong of the *Strickland* test is whether counsel's error materially prejudiced the defendant. Under this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. In *Strickland,* the Supreme Court explained:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting

> guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. In *Skaggs v. Parker,* 235 F.3d 261 (6th Cir. 2000), this Court further noted that "[t]he Court recently emphasized that a petitioner need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the result would have been different." *Id.* at 271 (citing *Williams,* 529 U.S. at 362).

Both prongs of the *Strickland* test involve mixed questions of law and fact, and we review both the state court and district court determinations *de novo. Carter,* 218 F.3d at 591. "As a federal court reviewing a state criminal judgment, we do not consider a state court conclusion that counsel rendered effective assistance to be a fact binding on us." *Id.* (citing *Strickland,* 466 U.S. at 698). Because the Tennessee state court correctly stated the *Strickland* standard, the question before us is whether the state court's decision was an unreasonable application of the standard set by the Supreme Court for evaluating claims of ineffective assistance of counsel.

II. Analysis

A. Counsel's Trial Strategy was Unreasonable

This Court's recent death penalty jurisprudence indicates that we have not been reluctant to find ineffective

assistance of counsel in capital cases where there was no strategy at all or where the strategy was so completely ill-conceived as to be objectively unreasonable, especially when trial counsel fails to develop or present mitigating evidence at the sentencing phase. *See Coleman v. Mitchell,* 268 F.3d 417, 449-53 (6th Cir. 2001) (finding that counsel was ineffective for failing to investigate and present mitigating evidence regarding the petitioner's personal background, psychological history and potential organic brain dysfunction at the penalty phase); *Skaggs,* 235 F.3d at 266-75 (finding that while counsel was not ineffective during the guilt phase for failing to investigate the credentials of a fraudulent "psychologist," counsel was ineffective because he failed to find a different psychiatric expert as his central mitigation witness at the penalty phase and because counsel essentially provided no legitimate mitigating evidence at sentencing); *Carter,* 218 F.3d at 594-600 (concluding that counsel's failure to investigate the petitioner's family, social or psychological background and present mitigating evidence at the sentencing phase amounted to ineffective assistance of counsel, "constitut[ing] deficiencies so severe as to dispense with the need to establish prejudice"); *Combs,* 205 F.3d at 287-88 (finding defense counsel's failure to question his only expert witness about his opinion regarding whether the petitioner lacked the requisite intent to commit the crimes before putting him on the stand at the culpability phase was "inexcusable" and "objectively unreasonable," amounting to ineffective assistance of counsel where the expert's testimony that petitioner did not lack the requisite intent "contradicted the sole defense theory" and "was completely devastating to the defense"); *Rickman v. Bell,* 131 F.3d 1150, 1159-60 (6th Cir. 1997) (ruling that trial counsel's portrayal of his client as "vicious and abnormal," labeling

him as "nuts" and "just ... out of somebody's insane asylum," was not a legitimate trial strategy, depriving his client of the effective assistance of counsel); *Groseclose v. Bell,* 130 F.3d 1161, 1169-71 (1997) (holding that trial counsel's failure to have "any defense theory whatsoever" was, among other shortcomings, "especially appalling," amounting to ineffective assistance of counsel); *Austin,* 126 F.3d at 848-49 (holding that trial counsel's failure to investigate and present any mitigating evidence during the sentencing phase "because he did not think that it would do any good" constituted ineffective assistance of counsel since "this reasoning does not reflect a strategic decision, but rather an abdication of advocacy"); *Glenn v. Tate,* 71 F.3d 1204, 1207-11 (6th Cir. 1995) (finding that petitioner was denied the effective assistance of counsel during the sentencing phase as a result of counsel's failure to develop and present mitigation evidence regarding the petitioner's history, background and organic brain damage, noting that "[i]t was not that such information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons").

The case before us fits squarely within this line of cases in which counsel's failure to have a reasonable trial strategy in a capital case constitutes ineffective assistance of counsel. Specifically, trial counsel's decision to apply the court-ordered funds, granted in a motion filed pursuant to *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), to hire an industrial psychologist lacking the requisite professional background for the task at hand was simply not an "objectively reasonable" strategy in this case. Thompson's trial attorneys' failure to hire an appropriate psychiatric expert determined their purported trial strategy throughout this entire case. As a result, Thompson's trial attorneys failed

to present any legitimate mitigating evidence at the penalty phase of the trial. The consequence of trial counsel's thoroughly unreasonable trial strategy is that there can be no confidence in the reliability of the state court's death sentence.

As indicated, Thompson's trial attorneys at the commencement of the proceedings in the state trial court moved for funds to hire a psychiatric expert pursuant to *Ake* because they questioned the reliability of the psychiatric evaluation of the forensic team at Middle Tennessee Mental Health Institute ("MTMHI"). Trial counsel filed this motion for court-ordered funding because Thompson's mental status was in issue after he was charged in this case, he was going to be on trial for his life, and the state was going to present evidence of his future dangerousness. Presumably because Thompson made a threshold showing for psychiatric assistance under *Ake,* the trial court granted his motion for court-ordered funds to hire his own psychiatric expert to assist in his defense and to respond to the state's psychiatric experts.

In *Ake,* the Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment, an indigent defendant has the right to expert psychiatric assistance upon a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. As the Supreme Court explained, an indigent defendant, at a minimum, is entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. *Ake* also held that, when appropriate, the right to expert assistance applies to the sentencing phase of capital proceedings. *Id.* at 86. In doing so,

the Court emphasized the pivotal role that a psychiatric expert has come to play in such proceedings:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

* * *

> By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

Ake, 470 U.S. at 80-81 (citations omitted).

In this case, the trial court granted the defense's request for funds to hire a "private psychiatrist . . . for the purpose of affording counsel the benefit of private expert psychiatric consultation in regards to the defendant . . . to ensure that the constitutional rights of the defendant are properly protected." (J.A. at 24.) Although Thompson was provided with access to psychiatric assistance, as required by the Due Process Clause under *Ake*, his trial counsel took it upon themselves to hire an industrial psychologist who did not possess the proper professional qualifications necessary to respond to the state's mental or psychological examination of Thompson or to assist the defense. In failing to hire an appropriate psychiatric expert, and instead hiring Dr. Copple, an industrial psychologist, Thompson's trial counsel eviscerated Thompson's constitutional entitlement under *Ake* of any effective content. Thompson's trial counsel's alleged explanation for hiring Copple was that they could not find a psychiatrist in Nashville since the psychiatrist they ordinarily used had moved out of state.[2] In effect, Thompson's trial counsel's

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[2] The lead opinion's attempt to characterize Dr. Copple as a clinical psychologist as opposed to an industrial psychologist by virtue of Dr. Copple's self-serving description is unpersuasive. Despite the professional label that Dr. Copple chose for himself, the fact remains that by

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decision to hire Dr. Copple, stripped their client of his constitutional right to access to an appropriate psychiatric expert, nullifying the protections provided by the Due Process Clause. *See Starr v. Lockhart,* 23 F.3d 1280, 1289 (8th Cir. 1994) (noting that "[a]s *Ake* explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination," and finding that the petitioner's "exam was inappropriate because it did not delve into the mitigating questions essential to [the petitioner]"); *Smith v. McCormick,* 914 F.2d 1153, 1158-59 (9th Cir. 1990) ("[U]nder *Ake* . . . [the defendant] was entitled to his own competent psychiatric expert."). In short, Thompson's constitutional entitlement under *Ake* was rendered meaningless by his counsel's failure to hire an expert qualified to provide the psychiatric or psychological assistance necessary on the pertinent issues of Thompson's case.

As the trial record clearly shows, Dr. Copple did not have the requisite knowledge and training to provide the sort of expert assistance necessary to protect Thompson's constitutional rights. Simply put, Dr. Copple lacked the medical expertise to be a qualified witness in Thompson's

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definition, Dr. Copple is an industrial psychologist inasmuch as he specializes in the evaluation of Social Security applicants who allegedly suffer from psychological disorders which prevent the applicants from performing work in the national economy, and in "vocational evaluations" which are used to assist individuals in achieving their vocational goal. *See* STEDMAN'S MEDICAL DICTIONARY 1165 (27th ed.2000) (defining "industrial psychologist" as a licensed psychologist who specializes in "the application of the principles of psychology to problems in business and industry"). Significantly, Dr. Copple in no way could be characterized as a forensic psychologist. *See id.* (defining "forensic psychologist" as a licensed psychologist who specializes in "the application of psychology to legal matters in a court of law"); *see also infra* note 5.

behalf and to rebut the state's psychiatric evaluation performed by the team of forensic psychiatrists and psychologists at MTMHI. Specifically, as an industrial psychologist specializing in Social Security and vocational evaluations, Copple lacked the specialized knowledge, skill, experience, and training to function as a qualified witness in this capital case where a forensic psychologist or psychiatrist was needed to provide a psychological basis for Thompson's behavior in order to show that he was mentally impaired.

As a matter of fact, industrial psychologists generally, and Dr. Copple in particular, are not up to the task of functioning as forensic psychologists in capital cases. As described by the Society for Industrial and Organizational Psychology (SIOP),

> **Industrial-Organizational Psychologists are Versatile Behavioral Scientists Specializing in Human Behavior in the Work Place.**
>
> Industrial-organizational (called I-O) psychologists recognize the interdependence of individuals, organizations, and society, and they recognize the impact of factors such as increasing government influences, growing consumer awareness, skill shortages, and the changing nature of the workforce. I-O psychologists facilitate responses to issues and problems involving people at work by serving as advisors and catalysts for business, industry, labor, public, academic, community, and health organizations:
>
> They are:
>
> ◊ Scientists who derive principles of individual, group, and organizational behavior through research;

- ◊ Consultants and staff psychologists who develop scientific knowledge and apply it to the solution of problems at work; and
- ◊ Teachers who train in the research and application of industrial-organizational psychology.

http://www/sip.org/TIP/SIOP/brochure.html.[3] The American Psychological Association provides a similar definition, stating that "industrial/organizational psychologists apply psychological principles and research methods to the work place in the interest of improving productivity and the quality of work life." http://www.apa.org/students/brochure/subfields.html.[4]

[3] SIOP, Division 14 of the American Psychological Association and an organizational affiliate of the American Psychology Society, states that its purpose is to study and promote human performance in organizational and work settings, and is perhaps the most authoritative source in this country for information about the nature and expertise of industrial-organizational (I-O) psychologists.

[4] These descriptions of I/O psychologists are generally accepted by psychologists. For example, the MacMillan Dictionary of Psychology defines "industrial psychology" as "[t]he psychological study of all aspects of work and of the working environment, and the application of psychological findings to improving efficiency and contentment at work, through e.g. better selection methods, improved design of machinery, improved training, or improved organizational and management strategies." MACMILLAN DICTIONARY OF PSYCHOLOGY (2d ed.1995); *see also* THE DICTIONARY OF PSYCHOLOGY (1999) (Defining "industrial-organizational psychology" as "[t]he application of psychological theory and methods to industrial and organizational problems having to do with a person's self, others, job, machines, operations, etc. as well as to improving selection of personnel and work procedures, all in the interest of establishing a productive and happy climate in a variety of shops, agencies, and organizations, as well as enhancing profit"). As explained in the Baker Encyclopedia of Psychology & Counseling:

> "[a]reas of specialization within I/O psychology include personnel (industrial) psychology (selection) and hiring,

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The professional goals and expertise of industrial psychologists thus differ markedly from those of forensic psychiatrists or psychologists. As described by the American Academy of Psychiatry and Law ("AAPL"), "forensic psychiatry is a medical subspecialty that includes research and clinical practice in the many areas in which psychiatry is applied to legal issues," including criminal responsibility and criminal competence. http://www.emory.edu/AAPL/org.htm. Similarly, the American Board of Forensic Psychology, which is part of the American Board of Professional Psychology, defines "forensic psychology is the application of the science and profession of psychology to questions and issues relating to the law and legal system." The practice of forensic psychology includes, in pertinent part, "psychological evaluation and expert testimony regarding criminal forensic issues such as trial competency, waiver of Miranda rights, criminal responsibility." http://www.abfp.com/brochure.html.[5] An even more specific

> training, and performance appraisal). BAKER ENCYCLOPEDIA OF PSYCHOLOGY & COUNSELING 619 (2d ed.1999); *see also* 4 ENCYCLOPEDIA OF PSYCHOLOGY 252-63 (2000) (discussing industrial and organizational psychology in three articles about the history of the field, its principle theories and the assessments and interventions used in the field).

[5] In describing forensic psychiatry, the Baker Encyclopedia of Psychology & Counseling states:

> Forensic psychiatry is a branch of forensic medicine, the science that deals with the application of medical facts to legal problems. The term medico-legal refers to a contrasting distinction, a branch of law that deals with the application of legal principles to medical and psychiatric problems. Forensic psychiatry and medico-legal psychiatry are used interchangeably and while "forensic psychiatry" has a specific meaning, it is generically used to denote the interface shared by psychiatry and the law.

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definition of forensic psychology has been adopted by the American Psychological-Law Society, Division 41 of the American Psychological Association. Specifically, Section 1(B)(1) of The Speciality Guidelines for Forensic Psychologists provides:

> B. Scope
>
> 1. The Guidelines specify the nature of desirable professional practice by forensic psychologists, within any subdiscipline of psychology (e.g. clinical, developmental, social, experimental) when engaged regularly as forensic psychologists.

BAKER ENCYCLOPEDIA OF PSYCHOLOGY & COUNSELING, *supra* at 464. Similarly, "forensic psychology" is defined by the MacMillan Dictionary of Psychology to be "[a] branch of applied psychology that studies and makes practical suggestions about the working of the law." The Dictionary of Psychology also defines "forensic psychology" generally as "[t]he application of psychological principles and techniques in law, including the evaluation of testimony, functions of the expert witness, methods of interrogation, guilt detection, legal policies, diagnosis and therapy, and general assistance in a variety of problems." As explained in the Baker Encyclopedia of Psychology & Counseling:

> The role and function of a psychologist in a court setting can involve pretrial, trial and posttrial tasks. The pretrial question of competency of the defendant to cooperate with the attorney and understand the charges is usually determined by a combination of clinical interviews and tests such as intelligence tests, projective tests and tests for literacy.
>
> The psychologist may also be asked to determine the state of the defendant's mind at the time of the crime. This is a rather controversial aspect of the competency evaluation because the psychologist is asked to determine the defendant's mental state not at the time of the evaluation but at some previous time.

BAKER ENCYCLOPEDIA OF PSYCHOLOGY & COUNSELING, *supra* at 467.

> a. Psychologist" means any individual whose professional activities are defined by the American Psychological Association or by regulation of title by state registration or licensure, as the practice of psychology.
>
> b. *"Forensic psychology" means all forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psycholegal issues,* in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities and administrative, judicial, and legislative agencies acting in an adjudicative capacity.
>
> c. *"Forensic psychologist" means psychologists who regularly engage in the practice of forensic psychology as defined in I(B)(1)(b).*

The Speciality Guidelines for Forensic Psychologists at http://www.unl.edu/ap-ls/links.htm (15 Law and Human Behavior 657 (1991)) (emphasis added). The Speciality Guidelines for Forensic Psychologists further provide:

> III. COMPETENCE
>
> A. *Forensic psychologists provide services only in areas of psychology in which they have specialized knowledge, skill, experience, and education.*
>
> B. Forensic psychologists have an obligation to present to the court, regarding the specific matters to which they will testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training, and education) for their qualification as an expert, and the relevance of those

> factual bases to their qualification as an expert on the specific matters at issue.

Id. at 658 (emphasis added).

Turning to the present case, it was simply indefensible for Thompson's trial counsel to use the court-ordered funds designated for hiring a forensic psychiatrist to select Dr. Copple as their expert witness. Dr. Copple was not a forensic psychiatrist or even a general psychiatrist, nor was he a forensic psychologist. Rather, Dr. Copple's speciality involved psychological evaluations of Social Security applicants with problems that prevent them from working and "vocational evaluations," which are used for "helping people reach their vocational goals or choosing vocational goals." Although Dr. Copple was licensed to practice psychology in Tennessee, pursuant to Tenn.Code Ann. § 63-11-203, he clearly lacked the knowledge, skill, experience and training to function as a forensic psychologist in a capital murder case, as defined in I(B)(1)(b) of The Speciality Guidelines for Forensic Psychologists. Dr. Copple had never testified in a capital case and had not testified in a criminal case in years. Moreover, Thompson's trial counsel admitted that Dr. Copple was not an expert in criminal behavior. Thus, by their own admission, Thompson's trial counsel concede that Dr. Copple would not have been competent to function as a forensic psychologist, if the Speciality Guidelines for Forensic Psychologists had been in effect at the time of the trial, since he did not regularly engage in the practice of forensic psychology.

Further, had Rule 702 of the Tennessee Rule of Evidence, which tracks the federal rule, been applicable to this case, Dr. Copple would not have been qualified as an

expert witness in forensic psychology under the criteria of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992) since adopted by Tennessee Supreme Court in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997). Indeed, what Thompson needed at the sentencing phase of the trial was not an industrial psychologist opining about whether Thompson would "thrive" in prison, but a qualified expert who would help him escape the death penalty by giving testimony about his mental condition so as to convince the jury that the mitigating circumstances outweighed the aggravating factors. Contrary to the lead opinion's claim, given Dr. Copple's background and practice as an industrial psychologist, he simply was not qualified to be an expert in this case.

The present case is quite analogous to *Skaggs v. Parker,* 235 F.3d 261, 266-75 (6th Cir. 2000). There, this Court found that counsel was ineffective for failing to replace a fraudulent "psychologist" with a different expert witness as his central mitigation witness at the penalty phase and for essentially providing no legitimate mitigating evidence at sentencing. Dr. Copple is the functional equivalent of the fraudulent psychologist in *Skaggs* since he was not competent to function as a forensic psychologist in a capital murder case and since Dr. Copple's testimony actually made things worse for Thompson. Because Thompson's counsel failed to hire a proper expert, they were not able to introduce evidence of his mental impairment, relying upon the totally implausible notion of presenting his "positive qualities and reservoir of moral upbringing" as mitigating circumstances. Thus, as in *Skaggs,* trial counsel essentially failed to present legitimate mitigating evidence at the sentencing phase.

The failure to hire an appropriate psychiatric expert had dire consequences for Thompson, dictating his attorneys' purported trial strategy throughout this entire case. It is no exaggeration to say that the decision to hire Dr. Copple was the single most important decision that Thompson's trial counsel made in this case, determining their ensuing trial strategy, which yielded their idea of presenting Thompson's "positive qualities and reservoir of moral upbringing" given the alleged dearth of evidence about Thompson's mental condition as uncovered by Dr. Copple. Without an appropriate expert, Thompson was not able to present mitigating evidence about his mental condition to rebut the conclusions of Dr. Watson and the forensic team at MTMHI that Thompson was malingering mental illness. However, according to the testimony of Dr. Blair at the state post-conviction hearing, three psychiatrists who treated Thompson from 1985 to 1990 reached far different conclusions about Thompson's mental condition than those of the forensic psychiatric team at MTMHI. Dr. Crown similarly opined that Thompson suffered from some form of organic brain damage, which was secondary to a "schizo-affective disorder, bipolar subtype." Despite the fact that Thompson had suffered head injuries before the murder and experienced serious mental problems since incarceration, his trial attorneys, as a result of their failure to obtain the services of an appropriate psychiatric expert, were not in a position to develop this information. In view of Dr. Copple's professional background, then, there should be considerable doubt as to how much weight, if any, should be accorded Dr. Copple's concurrence with Dr. Watson and the forensic team at MTMHI that Thompson did not suffer from any mental illness.

In short, Thompson's trial counsel were hamstrung right from the start by their inability to respond to the state's psychiatric expert, since, without expert psychiatric assistance, they could not present proof of Thompson's mental problems, which may have provided a defense to the charges against him at the guilt phase or which could have constituted mitigating evidence at the penalty phase. It is precisely at this point that an appropriate psychiatric or psychological expert witness may have provided to the members of the jury the requisite medical testimony about Thompson's mental condition such that the jurors would have recommended that Thompson's life be spared. Specifically, it was the abject failure of Thompson's expert witness, as directed by his counsel, to present effective evidence of his mental problems that prejudiced him because it deprived him of any chance of convincing the jury to recommend a penalty short of the death sentence. Had Thompson been examined by a qualified psychologist or psychiatrist who had the appropriate expertise to be an effective witness, there is a substantial likelihood that the sentencing result in this case would have been different. Under the circumstances, it is fairly obvious that trial counsel's decision to apply the court-ordered funds to hire Dr. Copple was simply not an "objectively reasonable" strategy because Dr. Copple was not in the position to provide the kind of expert psychiatric assistance required by the Due Process Clause.

Given the absence of evidence in the form of expert testimony supporting Thompson's claim that he suffered from an adverse mental condition, his trial attorneys thus adopted, as if by default, the strategy of offering no defense in the guilt phase, while presenting Thompson's "positive qualities" as mitigating circumstances in the

penalty phase of this case. As trial counsel Richardson put it, he and his co-counsel called upon Dr. Copple to accentuate defendant's "positive moral qualities and reservoir of moral upbringing," as opposed to any "negative" evidence regarding defendant's mental condition. Thus, at the penalty phase, trial counsel offered Dr. Copple's testimony that Thompson is a sensitive, caring person who has "an exaggerated need for nurturance" or, alternatively, "an unusually strong need for what we call nurturance." In the context of this case, though, the idea that Thompson had "an unusually strong need for what we call nurturance" is baffling to the point of being incomprehensible insofar as explaining his alleged brutal murder of a woman or offering mitigating evidence for his sentence are concerned. Moreover, by presenting testimony at the penalty phase that Thompson had a need to "nurture," that he came from a "loving family," had a good reputation, and was "pleasant, easy-going and cheerful" before joining the Navy in 1979, his trial attorneys, in effect, condemned him to death, allowing the jury to infer that Thompson had absolutely no excuse for committing such a heinous crime. Thus, rather than present the jury with sympathetic evidence that might have tended to reduce the degree of Thompson's moral culpability or make him appear to be a more sympathetic figure in the eyes of the jurors, trial counsel, through their completely indefensible trial strategy, achieved exactly the opposite result at the penalty phase.

On appeal, Thompson argues that his counsel's strategy of presenting Thompson's "positive qualities" at the penalty phase also backfired, opening the door to the prosecution's elicitation of evidence about defendant's violent proclivities. In this regard, Thompson claims that

his ex-girlfriend, Ms. Cajulao, could have testified at the penalty phase about various incidents in which he "snapped," but did not because she was not properly prepared to testify since his attorneys' strategy was to present Thompson's "positive qualities." In any case, despite defense counsel's apparent strategy, Cajulao testified on direct examination about Thompson's "paranoid" behavior in the Navy after he was assaulted by three men with a crowbar and about his discharge from the Navy resulting from the incident in which Thompson pushed an officer, dislocating the officer's shoulder or breaking his collarbone. Cajulao also was forced on cross-examination to testify about Thompson's involvement in other violent incidents while in the Navy, which included threats to assault Navy personnel with a torque wrench extension bar and a five-inch steak knife.

As already noted, defense trial counsel was aware of Thompson's violent behavior in the military. Thus, defense trial counsel was presented with the problem of how to account for Thompson's violent behavior in light of their chosen strategy of presenting his "positive qualities." Nevertheless, Thompson's trial counsel Parsons realized that there was a puzzling change in Thompson's behavior from the time he lived in Georgia before joining the Navy, wherein Thompson went from being "non-violent, cooperative and responsible" and "pleasant, easy-going, cheerful" to a "paranoid" individual apt to engage in violent assaultive behavior. Although trial counsel offered no explanation for Thompson's radical behavioral change, there was evidence, as Dr. Blair recognized, indicating that Thompson had a history of head injuries and that since 1985, he had shown a deteriorating mental status, becoming psychotic, with mood swings indicative of bipolar disorder

or schizo affective disorder or schizophrenia. In her testimony at the post-conviction hearing, Dr. Blair intimated that Thompson's troubles in the Navy just before the crime in this case suggested that he was becoming mentally ill at that time. Notwithstanding the evidence regarding the marked change in Thompson's behavior during his time in the Navy, along with well-founded questions about his possible mental illness, trial counsel was simply not in the position to exploit this evidence on behalf of Thompson's defense. Again, the reason why Thompson's trial counsel could not avail themselves of this evidence was a direct consequence of their own failure to hire an appropriate psychiatric expert in this case. They therefore could not present the jury with a plausible explanation in psychiatric terms as to why Thompson's behavior had changed so markedly. Viewed in this way, then, trial counsel's strategy of only presenting Thompson's "positive qualities" must be seen in the context of this case as tantamount to presenting no defense for him at all. Trial counsel's strategy actually resulted in the introduction, by way of rebuttal, of additional damaging evidence against Thompson.

Contrary to defense trial counsel's characterization, this case did not present them with a Hobson's choice of offering only evidence of Thompson's "positive qualities" or no evidence at all in the penalty phase. Indeed, by accounting for the marked change in Thompson's behavior after he joined the Navy, expert psychiatric testimony supporting the notion that Thompson suffered from mental illness or an adverse mental condition would have provided a plausible explanation for Thompson's "positive qualities" in contradistinction to his subsequent violent behavior. However, by not being able to offer the jury any

plausible psychiatric explanation regarding the significance of Thompson's change in behavior as witnessed by Cajulao and others, his trial counsel essentially abdicated their roles as meaningful advocates on behalf of their client. This is because defense counsel had nothing with which to rebut the state's proofs after opening the door to the issue of whether Thompson was a "good person."

In summary, the performance of Thompson's trial attorneys in this capital case was well below an objective standard of reasonableness demanded by the Sixth Amendment. Here, trial counsel rendered nugatory the protections afforded by the Due Process Clause by failing to hire an appropriate psychiatric expert as directed by the trial court's order pursuant to *Ake*. As a result of their own error in failing to hire an appropriate psychiatric expert to respond to the state's psychiatric evidence and to assist the defense, trial counsel availed themselves of the purported strategy of presenting no defense at the guilt phase and of offering Thompson's "positive qualities" as mitigating evidence in the penalty phase without attempting to provide a plausible psychiatric explanation for Thompson's anti-social and criminal behavior.

The lead opinion's reasoning that Thompson's trial counsel cannot be found to have acted unreasonably because there was no proof of Thompson's mental illness at the time of the crime, is circular and unpersuasive. Indeed, without the proper psychiatric assistance to adduce evidence of Thompson's mental condition, no proof could be offered. Thus, counsel's strategy simply amounted to no strategy at all and permeated these entire proceedings *ab initio,* depriving Thompson of the ability to mount any defense in the guilt phase and to present important mitigating evidence about his mental condition at the

penalty phase. In so doing, trial counsel left their client virtually defenseless, as though he were without any representation, facing the charges and a death sentence on his own.

B. The Prejudice Prong under *Strickland*

Having concluded that trial counsel's performance was deficient in both the guilt and penalty phases of this case, the next question is whether there was prejudice. To establish prejudice under *Strickland,* Thompson must show that "there is a reasonable probability, absent the errors, that the factfinder would have had a reasonable doubt respecting guilt" and that "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695.

On the present record, there does not appear to be a reasonable probability that, but for trial counsel's thoroughly deficient performance, the jury would have had a reasonable doubt about Thompson's guilt. As Thompson's trial attorneys recognized, there was overwhelming evidence that he committed the murder. While there was no apparent defense to Thompson's factual guilt, the question still remains whether his trial counsel could have mounted an effective psychiatric defense in the guilt phase by showing that he was under some psychiatric or psychological impairment at the time of the murder. In this regard, it should be noted that the record seemed to suggest that Thompson was competent at the time of trial. Dr. Crown, while not asked to give an opinion about whether Thompson was competent during his state trial,

opined that Thompson was competent at the time of his examination on June 12, 1998. Dr. Blair testified about Thompson's deteriorating mental condition since 1985 and suggested that he was likely suffering from schizophrenia at the time of the crime. However, she declined to render a formal opinion about Thompson's mental condition at the time of the crime, claiming that she needed more information about Thompson's background before she could render such an opinion. Thus, there is nothing in the present record to indicate that Thompson was not competent at the time of the murder, or to show that he was suffering from some form of organic brain damage or mental illness at the time of the murder.

Because the evidence does not sufficiently indicate that Thompson was under some psychiatric or psychological impairment at the time of the crime so as to absolve him of criminal culpability, it is unclear whether Thompson would have been able to mount an effective psychiatric defense at the guilt phase if his trial counsel had secured the services of an appropriate psychiatric expert. Although Thompson had suffered some head injuries and experienced mental instability during the time of his service in the Navy, and though his mental condition may have continued to decline subsequent to the crime, the present record does not allow us to conclude whether the assistance of an appropriate psychiatric expert would have altered the outcome of the guilt phase of Thompson's trial.

On the other hand, there certainly is reasonable probability that, but for trial counsel's deficiencies at the penalty phase of the trial, the jury would have concluded that the death sentence was not warranted in this case. It is well-established that at the sentencing phase of a

capital trial, the jury must consider the facts and circumstances of the crime and the character and background of the defendant. *Lockett v. Ohio,* 438 U.S. 586, 604 (1978); *Austin,* 126 F.3d at 848. As this Court noted in *Coe:*

> We have previously had occasion to explore the nature of the Tennessee death penalty process:
>
> Tennessee is a "weighing" state – that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed.

Coe, 161 F.3d at 332 (quoting *Houston v. Dutton,* 50 F.3d 381, 387 (6th Cir. 1995)).

Here, it seems quite likely that, but for trial counsel's objectively unreasonable strategy triggered by their failure to hire an appropriate psychiatric expert, the result at the penalty phase was likely to have been different. *See Strickland,* 466 U.S. at 700; *Mayfield v. Woodford,* 270 F.3d 915, 932 (9th Cir. 2001) ("If the jury had considered the testimony of experts in endocrinology and toxicology, or of friends and family members relating additional humanizing stories, there is a reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.") (internal quotation marks and citation omitted); *Skaggs,* 235 F.3d at 269-75 (finding that counsel's failure to find a different psychiatric expert for the penalty phase of the trial was prejudicial because it resulted in the

presentation of no mitigation evidence at all, even though the defendant suffered from mild mental retardation and diminished capacity); *Glenn,* 71 F.3d at 1210-11 (holding that counsel's failure to present pertinent evidence of mental history and mental capacity was prejudicial).

Although in the absence of competent psychiatric testimony there was insufficient evidence showing that Thompson was suffering from some psychiatric or psychological impairment at the time of the crime, there was, on the other hand, sufficient record testimony indicating that his mental condition has deteriorated since 1985. As Dr. Blair pointed out in her testimony at the post-conviction evidentiary hearing, three psychiatrists who treated or examined Thompson from 1985 to 1990 diagnosed him as either having a bipolar disorder or a schizoaffective disorder or schizophrenia. According to Dr. Blair, "there was some question as to whether [Thompson] accurately fit the diagnostic criteria for [schizoaffective] disorder or schizophrenia or a bipolar disorder, all of which usually begin in early adulthood." Further, on the basis of the reports of the mental health professionals treating Thompson since the late 1980s, Dr. Crown concluded that Thompson suffered from some form of organic brain damage, which was secondary to a "schizo-affective disorder, bipolar subtype." Given what the evidence about Thompson's deteriorating mental condition after the crime suggests about his mental condition at the time of the crime, there is reasonable probability that, but for trial counsel's failure to obtain appropriate psychiatric assistance so as to investigate and present mitigating evidence regarding the marked change in Thompson's behavior during his time in the Navy and his possible mental illness, the jury would have concluded by balancing the

aggravating and mitigating circumstances that the death sentence was not warranted.

In this case, the availability of psychiatric expert testimony that, at the time of the crime or at the time of the trial, Thompson suffered from some form of psychiatric disorder, including perhaps even organic brain disorder or bipolar disorder, schizo affective disorder or schizophrenia, would have presented the jury with a far more sympathetic figure – which would likely have altered the conclusion that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, there can be no confidence in the reliability of the death sentence imposed in this case because there is a reasonable probability that, but for trial counsel's deficient performance at the penalty phase of the trial, the jury would not have recommended the death penalty. *See Austin,* 126 F.3d at 849 (holding that "[counsel's] failure to investigate or present any mitigating evidence undermined the adversarial process and rendered the death sentence unreliable").

III. Conclusion

Regardless of evidence presented against Thompson at the guilt phase, trial counsel's deficient performance sealed his fate at the penalty phase. Instead of making extraordinary efforts as prescribed by ABA standards, *Combs,* 205 F.3d at 289-90, trial counsel's performance on Thompson's behalf at the penalty phase was not merely ineffectual, but positively detrimental to his cause. To hold that AEDPA compels us to uphold the patently unreasonable action of Thompson's trial attorneys under its presumed interpretative strictures is to misrepresent AEDPA. The result in *Williams v. Taylor,* 529 U.S. 362 (2000)

supports the view that the state court's application of *Strickland* was more than incorrect; it was in fact unreasonable, thereby satisfying the requirements of AEDPA. This is so because a competent attorney unquestionably would have obtained a suitable expert in a capital offense case such as this. To hold otherwise, as the state court did, constitutes an unreasonable application of *Strickland* because, as a consequence of trial counsel's error, the jury was not given the opportunity to consider evidence about Thompson's deteriorating mental condition after he was discharged from the Navy, which might have caused the jury to recommend the option of life imprisonment without parole instead of the death penalty. Considering the highly prejudicial consequences of the unreasonable strategy of Thompson's trial counsel flowing from their error in failing to hire the proper expert to examine Thompson, it is clear that the state court's application of *Strickland* was unreasonable.

For the foregoing reasons, I would therefore reverse the district court's judgment granting summary judgment to Warden Bell and remand to the district court with instructions to issue a writ of habeas corpus vacating Thompson's death sentence unless the State of Tennessee conducts a new penalty trial proceeding within 180 days of remand, while providing Thompson with the appropriate psychiatric services necessary to assist the defense in the presentation of mitigating evidence as guaranteed to Thompson by the Constitution.

(2) Supreme Court, U.S.
FILED

No. 04-_____

04 514 OCT 14 2004

In The OFFICE OF THE CLERK

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 202 TO 386

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

GREGORY THOMPSON *Petitioner*,	)	
v.	)	No. 4:98-cv-006
RICKY BELL, WARDEN, Riverbend Maximum Security Institution,	)	*Edgar*
Respondent.	)	

MEMORANDUM

(Filed Feb. 17, 2000)

This is a petition for the writ of habeas corpus under 28 U.S.C. § 2254; Gregory Thompson ("Thompson" or "petitioner") is presently incarcerated on death row. Before the Court is the respondent's answer to the amended petition and motion for summary judgment, the petitioner's traverse to the answer, and the petitioner's response to the motion for summary judgment. For the following reasons, the respondent's motion for summary judgment (Court File No. 81) will be **GRANTED**, and Thompson's petition and amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Court File Nos. 3 & 17) will be **DISMISSED**.

I. Procedural Background

The State of Tennessee has provided the Court with copies of petitioner's state court proceedings. (Court File No. 5, Addenda 1A-K, 2-11, 12 A-K, 13-20; the record consists of 20 volumes of record, 3 video tapes, and 1 folder

of large trial exhibits). Petitioner was convicted of the first degree murder of Mrs. Brenda Blanton Lane and was sentenced to death by electrocution. (Technical Record of petitioner's pre-trial proceedings and criminal trial, criminal trial exhibits, transcript of the evidence, Addenda 1A-K). His conviction and sentence were affirmed on direct appeal. *State v. Thompson*, 768 S.W. 239 (Tenn. 1989).

Petitioner, through his court-appointed attorneys, Robert J. Warner, Jr. and Joseph E. Ford, filed the original petition for post-conviction relief on October 16, 1990, in the Circuit Court of Coffee County, Tennessee. Petitioner alleged several instances of ineffective assistance of counsel:

(a) Trial counsel failed to adequately investigate the background, personal, and medical history of petitioner to present mitigating evidence during the penalty phase of trial.

(b) Trial counsel failed to request and obtain adequate expert and investigative assistance regarding petitioner's head injuries during his youth, and failed to obtain adequate expert assistance regarding petitioner's competency at the time of petitioner's confession.

(c) Trial counsel failed to present an adequate defense at trial. Counsel failed to cross-examine numerous witnesses and failed to challenge the prosecutor's implication to the jury during his closing argument that petitioner was required to present a defense. Counsel repeatedly referred to the fact that Gregory Thompson "committed the act" and repeatedly referred to the "atrocity" and "horrible" nature of the crime.

(d) Trial counsel failed to cross-examine the district attorney about the district attorney's professional attorney's professional misconduct and racial bias.

(e) Trial counsel failed to request additional time from the trial court to properly prepare witnesses during the penalty phase of the trial. Counsel failed to prepare witnesses during the penalty phase of the trial. Counsel failed to prepare witnesses such as Arlene Cajulao for areas of cross-examination and failed to show witnesses documents that were later used for impeachment purposes of the witnesses in front of the jury.

(f) Trial counsel failed to adequately explain to petitioner potential conflict of interest of counsel and failed to allow petitioner the opportunity to select new counsel. Counsel also failed to insure the protection of petitioner's rights against self-incrimination by allowing petitioner to go to Central State Hospital for interrogation without the assistance of counsel.

(g) Trial counsel failed to object to jury instructions at the penalty phase which shifted the burden of proof to petitioner to show the existence of mitigating circumstances.

(h) Trial counsel failed to object to the jury's consideration of the victim's character in determining whether to impose the death penalty and during the state's case-in-chief.

(i) Trial counsel failed to object to jury instructions which limited the jury's individualized consideration of mitigating factors including, but not limited to, sympathy.

(j) Trial counsel failed to object to the inadequate jury instructions by the court concerning the death penalty and failed to object to the trial court's failure to tailor the instructions to the individual facts of the case. Counsel failed to present the Court with alternative jury instructions to remedy these deficiencies.

(k) Trial counsel failed to recuse themselves and withdraw from the appeal of petitioner once the issue of ineffective assistance of counsel was raised as an issue.

(l) Trial counsel failed to object to the exclusion of jurors based upon a religious test of said jurors in violation of Article 1, Section 6 of the Tennessee Constitution.

(m) Trial counsel failed to adequately investigate petitioner's military career. Counsel committed error by improperly raising the subject of petitioner's "good character" and "opened the door" for the prosecution to admit damaging information regarding petitioner in front of the jury.

(n) Trial counsel failed to raise such issues on appeal and was constitutionally ineffective in failing to raise and properly brief the claims which petitioner raised in his state post-conviction petition. Petitioner did not consent to representation by Mr. Richardson and Mr. Parsons on appeal and petitioner should have been appointed new counsel to represent his interest.

Petitioner also challenged the jury instructions given at the guilt phase, including but not limited to, the instruction

regarding inference that the killing was done maliciously; instructions which shifted the burden of proof on an element of the crime to petitioner; and inconsistent jury instructions that petitioner's confession was an acknowledgment of guilt. Petitioner also challenged the following jury instructions given at the penalty phase:

(a) Instructions that shifted the burden to petitioner to show the existence of mitigating circumstances;

(b) Instructions on aggravating circumstances which failed to narrow the class of person eligible for the death penalty;

(c) Instructions which limited the jury's consideration of mitigating factors including, but not limited to, sympathy.

(d) Instructions that diminished the jury's responsibility for imposing the death penalty;

(e) Instructions on aggravating circumstances were vague and overbroad and did not properly channel the jury's discretion and invited arbitrary, capricious and inconsistent application of the death penalty;

(f) Instructions which failed to advise the jury that they were the sole judges of the law and the facts during the penalty phase of the trial.

Petitioner also made numerous allegations to support his contention that the trial court committed reversible error in its conduct of the trial. Petitioner also alleged the state made numerous constitutional violations during trial. Petitioner alleged the Tennessee Death Penalty Statute is unconstitutional and that Thompson was not

competent to be executed. At the conclusion of an evidentiary hearing, the trial court denied the petition.

Petitioner appealed to the Tennessee Court of Criminal Appeals on the following issues:

(1) whether the post-conviction court erred by finding petitioner received effective assistance of counsel;

(2) whether the post-conviction court erred by denying funding for a psychologist or psychiatrist and an investigator;

(3) wether [sic] the post-conviction court erred by refusing to set aside the order designating Judge William Russell to hear this case and in refusing to reinstate Judge Buddy D. Perry;

(4) whether erroneous jury instructions defining deliberation and premeditation require reversal;

(5) whether the jury instructions on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague;

(6) whether the petitioner's confession was unlawfully obtained and illegally admitted at his trial;

(7) whether the failure of the trial court to instruct the jury on the effect of non-unanimity and the option to recommend life imprisonment violated the petitioner's rights under the Eighth and Fourteenth Amendments;

(8) whether the trial court's allowing Dr. Watson to testify and introduce psychiatric/

psychological reports through his testimony was an unconstitutional denial of petitioner's rights;

(9) whether the petitioner was denied his constitutional right to a trial by jury by the exclusion of two prospective jurors; and

(10) whether the petitioner's constitutional rights were violated by implicit references to his failure to testify.

The Tennessee Court of Criminal Appeals affirmed the judgment of the trial court. Specifically, the Tennessee Court of Criminal Appeals found no merit in the first four issues that were appealed and that issues five through eight were previously determined by the Tennessee Supreme Court on direct appeal and that issues nine and ten were waived.

Thompson appealed the judgment of the Tennessee Court of Criminal Appeals affirming the trial court's denial of relief on his post-conviction petition. The Tennessee Supreme Court denied Thompson's application for permission to appeal. Thompson appealed the following issues to the Tennessee Supreme Court:

I. There is a need to secure settlement of important issues of law relating to the standard by which the competence of criminal attorneys is measured.

II. There exists the need to secure the settlement of an important issue of law with regard to what type of hearing an applicant is allowed under the ruling of *Owens v. State* and under what circumstances funds for expert services should be granted in a capital post-conviction case.

III. There is a need to settle the important issue of law regarding the effectiveness of Orders issues by a Judge in a capital post-conviction case when the Judge subsequently recuses himself.

IV. This court should exercise its supervisory authority by reviewing the decision to remove as trial Judge in the post-conviction action Judge Buddy D. Perry and replacing the same, without cause, with Judge William Russell.

V. This Court should review this case to settle the important question of law of the retroactive application of *State* v. *Brown*.

VI. There is a need to settle the important question of law as to whether the "heinous, atrocious or cruel" aggravating circumstance is unconstitutionally vague even when using the additional definitional terms from *State v. Williams*.

VII. There is a need to settle the important question of law regarding the admissibility of confessions under the heightened standard announced in *State v. Crump*.

VIII. There exists a need to settle the important question of law regarding the proper jury instruction of the affect of non-unanimity and the option to recommend life imprisonment.

II. Standard of Review

Thompson may obtain habeas relief if he can demonstrate he is in custody pursuant to the judgment of a state

court in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254. Under Rule 8 of the RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICTS [sic] COURTS, the Court is to determine, after a review of the response, the transcript, record of state court proceedings, and the expanded record, whether an evidentiary hearing is required. If a hearing is not required, the district judge is to dispose of the case as justice dictates. The Court finds it is unnecessary to hold an evidentiary hearing in the present case.

Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 2414 (1996) ("AEDPA"), signed into law on April 24, 1996, has significantly amended Title 28 of the UNITED STATES CODE and altered the standard of review that a federal court must employ when deciding whether to grant a writ of habeas corpus. As amended, 28 U.S.C. § 2254(d) (1997) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As amended, 28 U.S.C. § 2254(e) provides as follows:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Thompson filed his application for a writ of habeas corpus on June 12, 1998, after the effective date of AEDPA. The United States Supreme Court has instructed that the AEDPA generally applies to cases filed after the

act became effective. *See Lindh v. Murphy,* 521 U.S. 320 (1997) (holding the new provisions of Chapter 153 generally apply only to cases filed after the effective date of the Act). The Sixth Circuit has previously held that the provisions of the AEDPA, including the amended standard of review apply in cases filed after April 24, 1996. Therefore, revised §§ 2254(d) and (e) govern the inquiry as to whether or not *habeas corpus* relief is appropriate in this case.

Federal courts must now give greater deference to the determinations made by state courts than they were required to do under the previous law. *Spreitzer v. Peters,* 114 F.3d 1435, 1441 (7th Cir.), *modified on other grounds,* 127 F.3d 551 (1997), *cert. denied*, 118 S. Ct. 1060 (1998); *Nevers v. Killinger,* 990 F. Supp. 844, 849-850 (E.D. Mich. 1997), *aff'd* 169 F.3d 352, *cert denied*, 119 S. Ct. 2340 (1999). These amendments to § 2254 mean that the "the federal courts must respect all reasonable decisions of the state courts." *Tinsley v. O'Dea,* 1998 WL 124045, *2 (Table, text at 142 F.3d 436) (6th Cir. March 12, 1998)) (UNPUBLISHED DECISION). *See also Harpster v. State of Ohio,* 128 F.3d 322 (6th. Cir. 1997), *cert. denied,* 118 S. Ct. 1044 (1998).

Although the United States Supreme Court and the Court of Appeals for the Sixth Circuit have not yet decided how to implement these new standards, this Court is guided by the Sixth Circuit's recent opinions in *Barker v. Yukins,* ___ F.3d ___, 1999 WL 1146742, at *4 (6th Cir. Dec. 15, 1999); *Nevers v. Killinger,* 169 F.3d 352, 357-362 (6th Cir. 1999), and *Harpster v. State of Ohio,* 128 F.3d 322 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 1044 (1998). In those opinions the Sixth Circuit was confronted with mixed questions of law and fact and the Sixth Circuit

determined it must decide whether the state court decision involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. In *Nevers,* the Sixth Circuit "determined that, as a general rule, the (unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among reasonable jurists,' if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.'" *Nevers,* 169 F.3d 362. Therefore, in the Sixth Circuit, a writ may issue only if reasonable jurists would find a state court's application of federal law was so arbitrary, unsupported, or offensive to existing precedent as to fall outside the realm of plausible credible outcomes.

In determining how to apply the basic habeas test announced in *Nevers* to the specific issue of whether the state court's finding of harmless error involved an unreasonable application of federal law, the Sixth Circuit has determined that

> [[T]he] test is *whether* the error "had substantial and injurious effect or influence in determining the jury's verdict," [and] it is the habeas petitioner's burden to demonstrate that the trial error resulted in "actual prejudice," If the petitioner is able to make that showing, he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of [federal law].

Barker v. Yukins, ___ F.3d ___, 1999 WL 1146742, at *4.

The Sixth Circuit discussed the opinions of other circuits regarding the standard of review. The Fifth Circuit reads § 2254 as addressing three distinct challenges to a state court's decision. It has interpreted the "contrary to" clause in § 2254(d)(1) as addressing questions of pure law; the "unreasonable application" clause in § 2254(d)(1) as addressing mixed questions of law and fact; and § 2254(d)(2) as addressing questions of pure fact. The Seventh Circuit has articulated an approach very similar to that of the Fifth Circuit. *See Lindh v. Murphy,* 96 F.3d 856, 870 (7th Cir. 1996) (en banc) *rev'd on other grounds.*

The Eleventh Circuit developed an approach similar to that of the Fifth and Seventh Circuits. *See Neelley v. Nagle,* 138 F.3d 917 (11th Cir. 1998). The Eleventh Circuit first determines the clearly established law at the relevant time. Then, the Eleventh Circuit applies the "contrary to" clause to errors of pure law and the "unreasonable application" clause to mixed question of law and fact. In *Neelley,* the Court found "two situations in which a state court decision would be 'contrary to' clearly established Supreme Court" precedent under that phrase's plain meaning: " . . . when a state court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier," but reaches a different result; and when a state court "fails to apply the correct legal principles," as enunciated by Supreme Court case law, to decide a case. *Id.* at 923.

A state court's determination of a factual issue is presumed correct and the petitioner can rebut the presumption only by clear and convincing evidence. *Nevers,* 990 F. Supp. at 850. The challenge to a mixed question of law and fact requires the application of the second clause of § 2254(d)(1), and habeas relief will not be granted unless the state court's decision amounted to an unreasonable

application of clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1); *Harpster,* 128 F.3d at 326. "Mixed questions of law and fact are those decisions which require the application of a legal standard to fact determinations." *Nevers*, 990 F. Supp. at 850 (*citing Thompson v. Keohane,* 516 U.S. 99, 109-11 (1995)).

The Sixth Circuit has recently addressed what constitutes an unreasonable application of clearly established Federal law in *Nevers,* 169 F.3d at 362. The Sixth Circuit held that in arriving at the correct answer to the question of unreasonableness,

> [t]he deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," *Drinkard v. Johnson,* 97 F.3d[751] at, 769[(5th Cir. 1996), *cert. denied,* 520 U.S. 1107 (1997)], if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," *O'Brien [v. Dubois,]* 145 F.3d [16] at 25 [1st Cir. 1998].

Nevers, 169 F.3d at 362.

Some of the grounds asserted by Thompson in support of his present § 2254 petition for writ of habeas corpus are similar to the grounds asserted by Thompson in his appeal in the Tennessee courts. The review in this case involves an identical record to that considered by the state courts, a factor the Supreme Court has considered important in measuring the deference to be given to those courts. *See Sumner v. Mata*, 449 U.S. 539, 547 (1981).

The respondent has filed a motion for summary judgment. (Court File No. 81). FED. R. CIV. P. 56 provides that summary judgment will be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Summary judgment is proper (if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Johnson v. Turner,* 125 F.3d 324, 332 (6th Cir. 1997) *(quoting* FED. R. CIV. P. 56(c)). The burden is on the moving party to conclusively show that no genuine issue of material fact exists, and the Court must view the facts and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Morris v. Crete Carrier Corp.*, 105 F.3d 279, 280-81 (6th Cir. 1997); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

The moving party is not required to support a motion with evidence disproving the nonmoving party's claim but only needs to show the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). "The pivotal question is whether the party bearing the burden of proof has presented a jury question as to each element of its' case." *Hartsel,* 87 F.3d at 799, *citing Celotex*, 477 U.S. at 322.

Hearsay evidence is not considered on a motion for summary judgment. *Hartsel*, 87 F.3d at 799. "The mere

possibility of a factual dispute is not enough." *Id.* (Citations omitted). A court is required to make a preliminary assessment of the evidence when deciding whether plaintiff's evidence concerns a material issue and is more than *de minimis. Id.*

"Only factual disputes that might affect the outcome of a lawsuit under substantive law are 'material.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Cable v. Calhoun County Jail*, 124 F.3d 196, 1997 WL 595090, at *1 (6th Cir. Sept. 25, 1997). To qualify as a genuine issue as to any material fact, a dispute must involve evidence which a jury could find for the non-moving party. *Cable*, 1997 WL 595090, at *1. The moving party has the burden of showing there is an absence of evidence to support the non-moving party's case. *Id.*, at *1. Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party is required to come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 324-325; *White*, 909 F.2d at 943-44; *60 Ivy Street*, 822 F.2d at 1435. "The plaintiff must present more than a mere scintilla of evidence in support of her position; the plaintiff must present 'evidence on which the jury could reasonably find for the plaintiff.'" *Hartsel*, 87 F.3d at 799 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252).

The nonmoving party cannot rest on pleadings and allegations, but must present probative evidence which necessitates a resolution of the factual dispute at trial, *Mathis v. Bowater, Inc.*, 985 F.2d 277, 278 (6th Cir. 1993). If the nonmoving party fails to carry his or her burden by not making a sufficient showing of an essential element of

his or her case, summary judgment is appropriate. *Celotex*, 477 U.S. at 323. The moving party is entitled to summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997).

The judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper jury question, and not to weigh the evidence, judge the credibility of witnesses, and determine the truth of the matter, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249; *60 Ivy Street*, 822 F.2d at 1435-36. The standard for summary judgment mirrors the standard for directed verdict. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52 *see also Lapeer County, Mich. v. Montgomery County, Ohio*, 108 F.3d 74, 78 (6th Cir. 1997). There must be some probative evidence from which the jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 252; *Bailey v Floyd County Bd. Of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251-52; *University of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280 (6th Cir. 1995); *LaPointe v. UAW Local 600*, 8 F.3d 376, 378 (6th Cir. 1993).

After reviewing, under the summary judgment standards, each ground asserted by Thompson, this Court

concludes that he received a full and fair hearing on the merits of each issue he raised in the state court on his direct appeal from his conviction and in his post-conviction petition. This Court further finds that the state courts adequately resolved the questions of law and fact; and their decision did not involve an unreasonable application of clearly established Federal law as determined by the Supreme Court or an unreasonable determination of the facts. 28 U.S.C. §§ 2254(d)(1) and (2).

III. Factual Background

The following brief recitation of the facts is taken from the Tennessee Court of Criminal Appeals opinion:

> On January 1, 1985, the petitioner and Joanne McNamara, a juvenile, kidnaped the victim, Brenda Lane, at knife point in a Wal-Mart parking lot in Shelbyville, Tennessee. Thompson forced the victim to drive them to an isolated area outside Manchester, Tennessee, where he stabbed her four times in the back and then abandoned her. Thompson and McNamara returned to Georgia and attempted to burn the vehicle. After his arrest, the petitioner confessed to the crime and assisted authorities in locating the body. His confession was introduced as evidence during the trial.
>
> At the penalty phase of the trial several witnesses testified petitioner was a well-behaved, good student prior to leaving home in 1979. The petitioner's girlfriend, Arlene Cajulao, testified about his life after he left home, when he was in the military service and stationed in Hawaii. Dr. George Copple, a clinical psychologist, testified about the general abilities of the petitioner and

> what kinds of work he could perform during his imprisonment. Dr. Robert Watson testified that the petitioner exhibited anti-social adult behavior, was not remorseful, and malingered mental illness.

Thompson v. State, 958 S.W. 2d 156, 160 (Tenn. Crim. App. 1997).

IV. Analysis

Neither the original (Court File No. 7) nor amended petition (Court File No. 17) filed in this case complied with the verification requirements of 28 U.S.C. § 2242 or Rule 2(c) of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, which provide that a petition for writ of habeas corpus shall be signed under penalty of perjury by the petitioner, Rule 2(c); or signed and verified by either the petitioner or by one acting on his behalf. 28 U.S.C. § 2241. This Court ordered the amended petition for writ of habeas corpus to be signed and verified and returned to the Court. Instead of abiding by the Court's order, counsel for petitioner returned the amended petition for writ of habeas corpus unsigned and unverified, along with a document titled verification of amended petition for writ of habeas corpus signed only by counsel.

The Court issued another order requiring Thompson to personally sign and verify the amended petition for writ of habeas corpus. However, counsel has notified the Court that counsel is unable to provide this Court with a verification bearing Mr. Thompson's signature. Counsel submitted an affidavit from his investigator which in pertinent part states as follows:

3. Since April 1999, I have only seen Greg once. On that occasion Greg was behaving strangely and acting out. Due to his erratic behavior our meeting was cut short.

4. On January 13, 2000, I traveled to Riverbend Maximum Security Institution in Nashville to obtain Greg's signature on a verification of his amended petition for writ of habeas corpus. Greg is housed in Unit One as opposed to Unit Two which is death row. A corrections officer informed Greg that I was there to talk to him about his case. Greg did not come out of his cell. The corrections officer said Greg has up and down days. He described Greg as withdrawn and keeping to himself.

Counsel submits he is acting on Thompson's behalf and in the past petitioner expressed his intent to pursue the remedy of habeas corpus and litigate his case to its conclusion. Counsel further states petitioner has never indicated a desire to dismiss this case. (Court File No. 121, p. 5). The Court acknowledges that counsel for Thompson is acting on Thompson's behalf, and the Court will accept counsel's verification of amended petition for writ of habeas corpus.

Petitioner filed an amended petition for writ of habeas corpus which included all allegations made in his original petition. (Court File No. 17). Thompson's [sic] makes numerous claims which the Court will address in the same order, using the same number sequence, as petitioner did in his petition. However, Claims 17 and 20 will be addressed together since both claims allege failure to fund mental health experts. First, the Court will address petitioner's contention that all of the claims the state

contends are procedurally barred, are simply unexhausted and the Court is required to dismiss the petition without prejudice unless respondent waives exhaustion. Petitioner argues that if the respondent waives exhaustion, all claims must be considered *de novo*.

A habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See Granberry v. Greer*, 481 U.S. 129, 133-34 (1987); *Rose v. Lundy*, 455 U.S. 509, 519 (1982); Rule 4 RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. *Preiser v. Rodriguez*, 411 U.S. 475, 477, 489-90 (1973).

To exhaust these state remedies, the applicant must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle petitioner to relief," *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (*citing Picard*, 404 U.S. at 271). "'[T]he substance of a federal habeas corpus claim must first be presented to the state courts.'" *Gray*, 518 U.S. at 163 (*quoting Picard*, 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray*, 518 U.S. at 163.

"It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See O'Sullivan v. Boerckel,* 119 S. Ct. 1728, 1732-33 (1999) (holding that exhaustion requirement mandates presentation of all claims to state court through discretionary review process). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts, without presenting each factual claim. *Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987). The claims must be presented to the state courts as [sic] matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson V. Harless*, 459 U.S. 4, 6 (1982); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but state court."). *Cf. Gray*, 518 U.S. at 163.

Moreover, the state court must address the merits of those claims. *Coleman*, 501 U.S. at 734-35. If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can-show cause and prejudice for that default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

When a petitioner's claims have never been actually presented to the state courts but a state procedural rule prohibits the state courts from addressing the claims, then those claims are deemed exhausted, but procedurally barred. *Coleman,* 501 U.S. at 752-53; *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright v. Sykes,* 433 U.S. at 87-88; *Rust,* 17 F.3d at 160. A petitioner confronted with procedural default must show cause and prejudice for the default in order to obtain federal review of his claim. *Teague,* 489 U.S. at 297-99; *Wainwright v. Sykes,* 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman,* 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime," *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (*quoting Murray,* 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup,* 513 U.S. at 327.

Petitioner argues that any claim the state contends is procedurally barred should be reviewed *de novo* by the Court or the petition should be dismissed because it contains unexhausted claims. Petitioner contends these claims are simply unexhausted, not procedurally barred. Surely, counsel is aware the Tennessee statute of limitations for post-conviction relief bars petitioner from filing a

state post-conviction petition at this time. Therefore, his claims are not simply unexhausted, they are procedurally barred. Petitioner cites *Mapes v. Coyle*, 171 F.3d 408, 429 (6th Cir.), *cert. denied*, 120 S. Ct. 369 (1999) for the proposition that non-procedurally barred habeas corpus claims not considered on the merits in state court are reviewed *de novo*. Petitioner's counsel apparently overlooked the fact that *Mapes* applies to non-procedurally barred claims. Petitioner does not have any non-procedurally barred claims that were not considered on the merits in state court. Petitioner has procedurally barred claims that he failed to present to the highest Tennessee state courts.

Petitioner claims the Tennessee Supreme Court has held in *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992); and *Sands v. State*, 903 S.W. 2d 297, 301 (Tenn. 1995), that, in deciding whether to apply the Tennessee post-conviction statute of limitations. Tennessee courts are to weigh the state's interest in finality against the importance of the underlying constitutional error. Presumably, he is arguing this Court is not allowed to dismiss claims on procedural default unless the Tennessee court has ruled petitioner is procedurally barred from filing a state post-conviction petition.

Petitioner misplaces his reliance on the *Burford* exception where the *Burford* court concluded, "that application of Tenn. Code Ann. § 40-30-102 to bar consideration of the petition in this case deprives Burford of liberty without due process of law." *Burford v. State,* 845 S.W.2d at 209). *Burford* is a very narrow exception which does not apply in the case before this Court. Burford's grounds for relief, (earlier enhancing convictions which were subsequently declared void) occurred after the state's highest appellate court action, and the question arose as to the

effect of the later arising grounds on the statute of limitations period. Burford did not have grounds upon which he could challenge his Trousdale County sentence until the Wilson County convictions were declared invalid. Furthermore, that court found that "[i]t was abundantly clear that the petitioner has a valid claim to have his sentence reduced, and all the Trousdale County court will have to do is examine the record of the Wilson county proceedings. The *Trousdale County* court can then resentence Burford using the appropriate consideration set forth in the Criminal Sentencing Reform Act." *Burford v. State,* 845 S.W. 2d at 209.

First, the Court notes that *Burford* deals with the effect of later arising grounds on the statute of limitations; and the case before this Court does not deal with later arising grounds. Petitioner also cites *Sands v. State,* 903 S.W.2d 297 (Tenn. 1995), presumably for the argument that if his procedurally defaulted claims were sent back to state court, the statute of limitations might not be strictly applied. In *Sands,* the Tennessee Supreme Court was addressing a previous version of Tennessee's Post-Conviction Act. Under the new Act, the exceptions are explicitly set forth in TENN. CODE ANN. 40-30-202(b)[1] and

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[1] (a) Except as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an

(Continued on following page)

Thompson has failed to show that his claims fall within one of these exceptions.

Since Thompson's claims do not fall within one of the exceptions, it would be futile for Thompson to go back to state court. A federal court need not require a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred. *Harris v. Reed*, 489 U.S. 255, 263 n.9 (1989). Under the circumstances of this case, it would be futile for the Court

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action and is a condition upon its exercise, Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

(b) No court shall have jurisdiction to consider a petition filed after such time unless:

(1) The claim in the petition is based upon a final ruling of an appellate count establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

(c) This part contemplates the filing of only one (1) petition for post-conviction relief. . . .

to send this petitioner back to state court because it would be futile to pursue these procedurally-barred issues in state court. Exhaustion of state court remedies in this case is not required because all applicable statutes of limitations have expired, and any attempt to raise the unexhausted claim before the state court would be futile. *See Matlock v. Rose*, 731 F.2d 1236, 1240 (6th Cir. 1984) *cert. denier*, 470 U.S. 1050 (1985).

Petitioner does not set out his arguments relative to cause and prejudice concisely, but generally proffers ineffective assistance of post-conviction counsel as cause for his procedural default. Petitioner has no constitutional right to counsel in post-conviction proceedings. *Coleman*, 501 U.S. at 752. Since petitioner had no right to counsel in these proceedings in the first place, ineffective assistance rendered during the proceedings cannot serve as cause. *See Evitts v. Lucey*, 469 U.S. 387, 397 n.7 (1985) (holding that right to effective assistance of counsel depends on right to counsel itself). *See also Murray v. Giarrantano*, 492 U.S. 1, 10 (1989), *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Claim 17: ***INADEQUATE STATE PROCEDURE RESULTED IN THE DENIAL OF A FULL AND FAIR HEARING ON CONSTITUTIONAL VIOLATIONS; and***

Claim 20: ***DENIAL OF EXPERT FUNDING***

A. Denial of Expert Services

Petitioner claims he was denied funding for mental health and investigative experts at trial and during state post-conviction proceedings. (Court File No. 17, pp. 6-9, Claim 17). The question of whether the trial court erred by

failing to provide Thompson with funds to hire an independent expert witness is a mixed question of law and fact. Therefore, the Court must decide if the state court's denial of an expert witness "involved an unreasonable application of [] clearly established Federal Law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). *In Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), the United States Supreme Court held:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

At a minimum, Ake requires the petitioner to make allegations supported by a factual showing that his sanity is in fact at issue in the case. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1119 (6th Cir.), *cert denied,* 499 U.S. 970 (1991). Such a factual showing is not made by merely making a factually baseless claim that the defendant is insane or by entering a plea of not guilty due to insanity.

1. Denial of Funding for Experts at Trial

Petitioner's allegation that he was denied funding for mental health and investigative experts at trial "in all likelihood a word processing error more than any other[,]" according to petitioner's counsel. (Motion Hearing Transcript, pp. 40). Although petitioner's counsel informed the Court during the hearing on the respondent's motion for summary judgment that there was no claim being made regarding petitioner's access to mental health experts at trial, the Court will list the numerous pretrial motions and orders filed in the state trial court and the results of the proof at the trial court level to show what the state post-conviction court relied on when ruling upon motions for funds to pay mental health experts. The following motions and orders pertaining to requests for mental health and investigative experts are filed in Addendum 1A:

(1) Motion for Mental or Psychological Examination of Defendant – filed February 26, 1995 – requesting that a mental or psychological evaluation be ordered by the Court to determine whether petitioner was competent to stand trial and to determine his mental capacity at the time of the alleged commission of the crime.

(2) Supplementary Motion for Psychiatric Examination; and in Addition, for Neurological Examination – filed March 26, 1985 – requesting psychiatric evaluation and neurological examination of Thompson to determine whether Thompson was competent to stand trial and assist counsel with his defense, to determine whether Thompson was suffering from a mental illness on the date of the offense, and to determine

whether Thompson was in need of hospitalization for further psychiatric evaluation and/or treatment. A supporting affidavit by Thompson's trial attorney stated Thompson previously received two serious close-head injuries. When Thompson was sixteen years of age he was involved in a car wreck which resulted in Thompson being hospitalized with a serious concussion. The second injury occurred when he was in the United States Navy in 1981. He was beaten in the head with a hammer and received serious injuries, including, but not limited to, a concussion.

(3) Order Directing Forensic Evaluation by the Mental Health Center – March 28, 1985 – referring Thompson to the Multi-County Mental Health Center to determine Thompson's competency to stand trial and his mental capacity at the time of the crime.

(4) Order Directing Forensic Evaluation by the Mental Health Institute – April 4, 1985 – referring Thompson to Middle Tennessee Mental Health Institute to determine Thompson's competency to stand trial and his mental capacity at the time of the crime.

(5) Notice of Intent to use Industrial Psychologist – filed June 20, 1985, by Thompson of his intention to use the testimony of Dr. George Copple, a clinical psychologist regarding Thompson's mental conditions and abilities.

(6) Order (Ex Parte, Sealed) – filed July 29, 1985 – ordering that the charges of a private psychiatrist and pathologist, their

travel, motel and food expenses shall be paid by the executive secretary of the Supreme Court of the State of Tennessee for services performed by them on behalf of the defendant.

(7) Ex Parte Order – filed May 13, 1985 (Addendum 1B) – ordered that the requested sum of up to $800.00 shall be paid by the State of Tennessee to Dr. George Copple for services provided to Thompson.

(8) Ex Parte Order – entered August 13, 1985 (Addendum 1B) – approving that the State of Tennessee pay Dr. George Copple $300.00 per day for each day Dr. Copple attended the defendant's trial.

(9) Order Approving Attorney's Fees (Addendum 1B) – filed January 28, 1996 – approved payment of $945.00 to Dr. David K. Wheaton, a psychologist, for his consultation and testimony.

The murder was committed on January 1, 1985. (Court File 17, p. 2). On March 28, 1985, the state trial court, acting upon Thompson's motion, referred Thompson to the Multi-County Mental Health Center for certain forensic evaluations. (Addendum 1 A). The order directed the Multi-County Mental Health Center to evaluate Thompson for competency to stand trial, competency to assist counsel with his defense, and competency at the time the crime was committed. (Addendum 1A). Another order directing forensic evaluation was entered on April 4, 1985. Based upon motion of Thompson and based upon the recommendation of the Multi-County Mental Health Canter, Thompson was referred to Middle Tennessee Mental Health Institute for a maximum of thirty (30) days

for forensic evaluation. The trial court ordered the examination of Thompson by a team of examiners at Middle Tennessee Mental Health Institute, Thompson was sent to Middle Tennessee Mental Health Institute on or about April 18, 1985, and remained there for approximately a month. (Addendum 1 I, p.148). The report from Middle Tennessee Mental Health Institute was prepared in April of 1985 and found Thompson to be competent. The psychological findings failed to support a defense of insanity or a recommendation for judicial commitment. At Middle Tennessee Mental Health Institute Thompson was diagnosed as suffering from adult antisocial behavior. (Addendum 1 I, p. 62). The team specifically found:

> He exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.)

(Addendum 1 I, p.159).

Dr. George Ellis Copple, a clinical psychologist, testified on behalf of Thompson during the punishment phase of his trial. (Addendum 1 H, pp. 112-143; Addendum 1 I, pp. 2-98). Dr. Copple, at the request of Thompson's trial counsel, evaluated Thompson. (Addendum 1 H, p. 118). Dr. Copple's evaluation consisted of hours of testing and talking to Thompson, but mostly testing, and listening

to the witnesses during Thompson's trial. (Addendum 1 H, pp. 118-119).

Dr. Copple met with Thompson on May 15, 1985, at the Forensic Unit of the Middle Tennessee Mental Health Institute in private. Dr. Copple spent about three hours with Thompson giving him tests. (Addendum 1 H, p, 120). Dr. Copple gave Thompson some ability tests to determine what things Thompson might be capable of doing in a prison situation and what usefulness he might have to himself or others in a prison situation. (Addendum 1 H, p. 121).

Dr. Copple spent another three and one half hours with Thompson on August 2, 1985, at the Coffee County Jail giving him the Minnesota Multiplasic Personality Inventory, the Thematic Apperception Test, the Rotter Incomplete Sentences Blank, and the Rorschach or Ink Blot Test. (Addendum 1 H, pp. 124-126). Dr. Copple also met with Thompson for two twenty minute sessions after his trial began at Thompson's request. (Addendum 1 H, p. 127). Dr. Copple testified about Thompson's abilities and what jobs he could perform in prison. He also testified about Thompson's motivations in general and his behavior for which he was convicted as tied to his nurturant motivation. (Addendum 1Hh pp. 137-143, Addendum 1 I, pp. 2-6). Dr. Copple testified that Thompson's need to nurture "was very strong, strong enough to impel him to some unwise actions. . . . He had had opportunities to break this tie and this feeling of responsibility and protection he had with Joanne.[2] He had had numerous opportunities to do

[2] Joanne was the teenager with Thompson who distracted the victim by asking the victim for directions to the hospital so Thompson could come behind her and put a knife to her throat.

that, but he hadn't done that because of this inordinate or extremely strong drive to protect." (Addendum 1 I, p. 3). Dr. Copple further testified that Thompson is not crazy in any legal or psychiatric sense. Dr. Copple testified he did not think Thompson was abnormal or suffering from a mental illness, Dr. Copple administered the MMPI[3] and there was no indication that Thompson was crazy. (Addendum 1 I, p. 55-61).

The record clearly shows Thompson was provided with mental health experts and funds to pay for his own expert at trial. The trial court granted Thompson's motion for an independent state-paid psychiatrist and provided funds to pay an expert of Thompson's choice. Neither expert found Thompson to be incompetent or insane. Consequently, defense counsel did not put the experts on the witness stand during the innocence-guilt phase of the trial. Therefore, Thompson's claim for denial of an expert at trial will be **DISMISSED**. He is not entitled to any relief under § 2254.

2. *Denial of Funds for Experts at State Post-Conviction Proceedings*

Thompson claims the State of Tennessee denied him, the expert and investigative funding necessary to present his claims of constitutional error and then denied him a transcript of the hearing on the motion for expert services, thus precluding state review of the issue. The state contends this does not state a habeas claim because it does

[3] Thompson took the MMPI for Dr. Watson, and Dr. Watson concluded that Thompson attempted to take schizophrenia.

not go to the constitutionality of his conviction. Petitioner filed an *ex parte* motion for funds to pay a mental health expert and an investigator to assist with his post-conviction hearing. The motion was denied by the state post-conviction court. The motion was initially denied by Judge Ewell, who subsequently recused himself, and again by Judge Russell because petitioner failed to demonstrate a need for the requested funds.[4]

The writ of habeas corpus is not the proper means by which a prisoner should challenge errors or deficiencies in state post-conviction proceedings because these claims address collateral matters and not the underlying state

[4] This Court has reviewed the record, including the deposition of petitioner's recently hired expert, and does not find that Thompson demonstrated a need for the requested experts during his post-conviction hearing. The only issues before this Court regarding Thompson's mental health are his mental health at the time of the crime and at the time of trial. This Court does not find any evidence nor does Thompson cite any evidence that he was incompetent or mentally ill at the time he committed the crime or at the time of trial. The evidence introduced at trial through the testimony of the state's mental health expert and Thompson's mental health expert was that Thompson was neither incompetent nor insane.

Dr. Blair testified on petitioner's behalf during his state post-conviction hearing that she did not have an opinion about his diagnostic status in 1985, (Addendum 12 B, pp. 219-220). Petitioner claims experts recently obtained by him have revealed that he was incompetent under, Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide the proof of these revelations. The Court has read the deposition of Dr. Crown, (Court File No. 119, Exhibit 1) who stated he was not asked to render any determination about whether or not Thompson was competent during his state jury trial. (Court File No. 91, Exhibit 1, pp. 7-9). Dr. Crown stated he was only asked to make a competency determination at the time he met Mr. Thompson on June 12, 1998 and he found petitioner to be competent on that date. (Court File No. 91, Exhibit 1, pp. 7-?).

conviction giving rise to the prisoner's incarceration. *Kirby v. Dutton,* 94 F.2d 245, 247 (6th Cir. 1986), "Claims attacking a state court's application of post-conviction procedures do not state a basis for a federal claim under 28 U.S.C. § 2254." *Gattis v. Snyder,* 46 F.Supp. 2d 344 (D.De. 1999). A claim challenging the state post-conviction proceedings fails to state a federal constitutional claim cognizable in a federal habeas proceeding. *Steele v. Young,* 11 F.3d 1518, 1524 (10th Cir. 1993); *Duff Smith v. Collins,* 973 F.2d 1175, 1182 (5th Cir. 1992), *cert. denied*, 507 U.S. 1056 (1993). "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellants claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself . . . Infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief." *Vail v. Procnier*, 747 F.2d 277 (5th Cir. 1984). "Moreover, because state post-conviction proceedings are civil in nature, the Sixth Amendment right to effective assistance of counsel does not attach." *Noble v. Sigler*, 351 F.2d 673, 678 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Kirby v. Dutton*, 794 F.2d at 246 n.1.

Section 2254 gives federal courts the jurisdiction to determine the constitutionality of a state criminal conviction, but not the authority to review state post-conviction proceedings, *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir.), *cert. denied*, 495 U.S. 936 (1990); *Mitchell v. Wyrick,* 727 F.2d 773, 774 (8th Cir.), *cert. denied,* 469 U.S. 823 (1984). The constitution does not require the states to provide a means of post-conviction review, therefore an infirmity in a state post-conviction proceeding does not

raise a constitutional issue and is not cognizable in a federal habeas petition. *Tokar v Bowersox*, 1 F. Supp. 2d 986, 1015 (ED. MO 1998), *aff'd*, ___ F.3d ___, 1999 WL 1116835 (8th Cir. Dec. 8, 1999); *Gee v. Groose,* 110 F.3d 1346, 1351-52 (8th Cir. 1997); *Jolly v. Gammon,* 28 F.3d 51, 54 (8th Cir.), *cert. denied,* 513 U.S. 983 (1994); *Williams-Bey v. Trickey,* 894 F.2d at 317. Accordingly, petitioner's claim that he was denied funds for experts during state post-conviction proceedings and denied investigative funding will be **DISMISSED.**

To the extent Thompson claims he was denied a full and fair state past-conviction hearing, the Court finds he has failed to set forth facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, and Thompson has failed to provide this Court with any substantial evidence that the state post-conviction court denied him a full and fair hearing. To the extent Thompson claims he was denied a full and fair hearing on this state post-conviction motion for funds to hire experts he has failed to cite to or produce that part of the record pertinent to this claim or to inform the Court that he is unable to produce such part of the record. *See* 28 U.S.C. § 2254(f).

Although, Thompson has failed to properly state this claim, this Court has read the state post-conviction transcript and does not find petitioner was denied a full and fair hearing.[5] After Judge Ewell denied the motion for

[5] Thompson claims he was denied a full and fair post-conviction hearing. Thompson claims the state post-conviction court denied him a full and fair hearing which prevented him from developing his claims Thompson was represented by counsel and presented evidence. His

(Continued on following page)

funds for experts,[6] he recused himself. Judge Buddy Perry was assigned the case and upon a motion to reconsider the denial of expert and investigative funds, Judge Perry stayed the matter pending the release of the Court of Criminal Appeals of Tennessee opinion in the case of *Owens v. State,* 1994 WL 112997 (Tenn. Crim. App. March 25, 1994), *rev'd in part,* 908 S.W.2d 923 (Tenn. 1995). However, Judge Perry was replaced by Judge Russell who specifically found, in denying the motion, that "[t]he issue of the petitioner's mental competency was thoroughly litigated upon his trial. The Court finds that there has been no demonstrated need for the funds requested, and the motion is again denied." (Addendum 12 A, p. 262).

The state past-conviction court noted that Thompson alleged mental incompetence at the time of trial[7] and incompetence at the time of his post-conviction hearing alleging his incompetence prevented him from being subjected to the death penalty. However, the post-conviction court found that those issues were abandoned in post-hearing brief and argument. The post-conviction count further found that based on the court's observation

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attorneys were permitted to introduce evidence and examine and cross examine witnesses. The state post-conviction court held a hearing and made finding of facts and ruled on the issues.

[6] Petitioner failed to submit the transcript of this hearing to the Court of Appeals or to this Court. Therefore, this Court is unable to review this transcript. However, the record supports the trial court's finding that petitioner did not demonstrate a need for funds to hire experts.

[7] The State trial court granted Thompson's notion for an independent state-paid psychiatrist (Dr. Watson) and provided funds to pay an expert of Thompson's choice (Dr. Copple). Neither expert found Thompson to be incompetent or insane. The proof at trial clearly indicated Thompson was not incompetent and did not indicate any mental health mitigating evidence.

of the petitioner and the evidence presented, the petitioner was not mentally incompetent. (Addendum No. 12 a, pp. 394-395).

The Tennessee Criminal Court of Appeals found that:

> Judge Ewell's order denying services was not rendered void by his subsequent recusal. Moreover, without the transcript of the hearing before Judge Ewell, we cannot conclude there was an abuse of discretion in denying the services. It is the burden of the appellant to prepare a record on appeal that presents a complete and accurate account of what transpired in the trial court with respect to the issue on appeal. Tenn. R. App. P. 24(b). The failure to do so results in a waiver of such issues and a presumption that the ruling of the trial court was correct. On the record before us, we cannot conclude the trial court abused its discretion by denying the services.

(Addendum 17, p. 31-32) (Citations omitted).

To the extent Thompson is claiming the state post-conviction court incorrectly determined from the facts he submitted that he did not demonstrate a need for mental health experts, this claim is without merit because he has failed to rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1), Thompson failed to develop the factual basis of this claim in state court. Therefore, pursuant to 28 U.S.C. § 2254(2)(A) and (B),[8] this Court is prohibited from holding an evidentiary

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[8] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(Continued on following page)

hearing on this claim. To the extent Thompson claims his post-conviction counsel's failure to submit the transcript of the denial of funds is an excuse for his procedural default of this issue the Court finds this issue is without merit because there is no constitutional right to an attorney in state post-conviction proceedings. Consequently a petition cannot claim constitutionally ineffective assistance of counsel in such a proceeding. Therefore, Thompson must "bear the risk of attorney error that results in, a procedural default." *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). Under *Coleman* the alleged ineffective performance of Thompson's attorney in the post-conviction proceeding cannot be "cause" for Thompson's procedural default. Consequently this claim is not cognizable in this federal habeas corpus proceeding.

After thoroughly reviewing this record, this Court is unable to find that Thompson provided any reason to support the appointment of another psychiatrist. A psychiatric examination is not an adversary proceeding. Its purpose is to determine Thompson's sanity and/or competency and any mitigating mental health evidence. Thompson does not have a right to the appointment of a psychiatrist who will reach a biased or favorable conclusion.

(A) the claim relies on -

(i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Therefore, Thompson's claim for denial of experts at his post-conviction hearing and denial of a full and fair post-conviction hearing will be **DISMISSED**. He is not entitled to any relief on these issues under § 2254.

Claim 18: QUALIFIED REQUEST FOR FURTHER AMENDMENT

Petitioner requests leave to amend his petition should additional relevant facts be disclosed in the future. This case is presently before the Court on a motion for summary judgment and petitioner has not filed any further amendment. During oral argument counsel for petitioner stated this claim is "somewhat mooted." Therefore, this Claim 18 will be **DISMISSED** as **MOOT**.

Claim 19: TRIAL COUNSEL'S CONFLICTS OF INTEREST

Petitioner claims he was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by virtue of the appointments of attorneys John W. Rollins and H. Thomas Parsons, who suffered from actual conflicts of interests. Thompson claims John W. Rollins suffered a conflict due to his concurrent and active representation of Coffee County, Tennessee, during critical stages of Mr. Thompson's state court proceedings. Petitioner claims H. Thomas Parsons suffered a conflict due to his concurrent and active representation of the Sheriff of Coffee County during critical stages of Mr. Thompson's state court proceedings. Parsons represented the Coffee County Sheriff in an unrelated civil matter in federal district court. Petitioner claims H. Thomas Parsons was burdened by an additional conflict of interest by the

fact he was actively engaged in a financial relationship with the prosecuting attorney, Charles Buck Ramsey.[9]

The Supreme Court of Tennessee addressed the issue of conflict of interest regarding the attorney's representation of Thompson and the county or sheriff when Thompson appealed his conviction. As noted by the Supreme Court of Tennessee, both attorneys quickly moved to withdraw after being appointed to represent Thompson. Furthermore, Mr. Rollins did not confer with petitioner and took no part in his representation and was relieved on April 9, 1985. On the same day Mr. Doyle Richardson was substituted as co-counsel. *State v. Thompson,* 768 S.W.2d 239, 244 (1989).

On June 20, 1985, Mr. Parsons was relieved as counsel for Thompson by order of the Tennessee Court of Criminal Appeals because of the possibility that the Sheriff's subordinates would give material testimony at trial. On July 5, 1985, Mr. Richardson, on behalf of Thompson, moved to have Mr. Parsons re-appointed since the conflict was resolved by the settlement of the Sheriff's civil suit. On July 10, 1985, the court of criminal appeals ordered his reappointment. *Id.*

The Supreme Court of Tennessee did not find any actual conflict. "[T]he conflict claimed here was only a potential one and quite remote; and it was resolved before trial. Without a showing of prejudice – and an attorney's good faith assertion of his disqualification is not in itself

[9] Mr. Parson testified that the fact he helped General Ramsey, the prosecuting attorney, in some way in his financial matters did not enter into the trial of this case in any respect. Furthermore, Thompson apparently signed a waiver waiving any objection to the possible conflict (Addendum 12B, pp. 35-36).

ineffective representation – there is no denial of counsel." *Id.* Furthermore, the evidence shows that only one Sheriffs employee testified at trial and his testimony was limited to establishing the chain of custody of the knife found by the road crew. The majority of the investigation was conducted by the Tennessee Bureau of Investigation.

Petitioner has not alleged nor does this Court find that the state court's decision was contrary to or an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, Thompson's claim that he was denied his constitutional rights due to trial counsel's conflict will be **DISMISSED**.

Petitioner claims Mr. Parsons also had a conflict of interest by the fact he was actively engaged in a financial relationship with the prosecuting attorney, Charles Buck Ramsey. The state claims the issue regarding Mr. Parson's conflict due to an active financial relationship with the prosecuting attorney is procedurally defaulted.

Although, there was some testimony regarding a financial relationship between Parsons and the District Attorney, Thompson did not present this issue on his direct appeal or in his appeal of his post-conviction petition. Thompson presented this claim during his state post-conviction petition hearing.

However, he failed to raise this issue on appeal. Thompson contends he was denied the opportunity to establish the claim. However, the record does not support his claim. The following colloquy took place:

MR. PARSONS: . . . The matter which you are getting to involves financial problems that Mr. Ramsey got into.

MR. FORD: Do you recall when he got into the financial problems?

MR. PARSON: I really don't. It was back in the early '80s, late '70's or early '80s.

MR. FORD: Was it going on at the time of the Thompson trial?

MR. PRUDEN: Objection, relevance, Your Honor.

THE COURT: How is this relevant, Mr. Ford?

MR. FORD: We are going to an issue of conflict, Your Honor. I believe the proof will, show that Mr. Parsons and other people came to the financial aid of Buck Ramsey, actually helped him in the purchase of a house.

MR. PRUDEN: Your Honor, it's not in the petition.

MR. FORD: Conflict. We put "conflict" in there. Our client would raise that also but we did put the issue of conflict in there.

THE COURT: Let me ask you this questions, assuming that the facts show Mr. Parsons assisted the District Attorney General in his financial matters, how is that going to be detrimental to this petitioner? I would think that would be about the best thing you could do.

MR. FORD: Apparently at some point, the conflict was recognized by Mr. Parsons who got out [sic] client to sign a wavier [sic] waiving any objection to this conflict so apparently, it entered into the mind of Mr. Parsons and apparently, it entered into the mind of Mr. Parsons and caused him some pause. Therefore, we feel like we need to delve into it and see what, if any effect it had on his representation of this man. Apparently, it caused him enough pause to get a waiver signed.

THE COURT: Well, let's just ask him that question and get right to the heart of it. Mr. Parsons, did the fact you had apparently helped General Ramsey in some way in his financial matters enter into the trial of this case in any respect?

THE WITNESS: Not at all.

MR. FORD: You cut out about half of my questions, Judge.

THE COURT: That was my purpose.

The record shows Mr. Ford was not prevented from questioning the witness further. Mr. Ford stated that the Judge's question cut out about half of his questions but the Judge did not prevent him from asking further relevant questions. Petitioner was not denied an opportunity to establish this claim. The Judge did not prevent questioning regarding the petitioner signing the waiver or circumstances

surrounding the signing of the waiver. Accordingly, the Court finds that petitioner was provided with an opportunity to establish this claim. The Court further finds that Thompson has failed to fairly present this issue to the Tennessee Supreme Court resulting in procedural default. Thompson has not shown cause and prejudice to excuse this default. Accordingly, petitioner's claim that he was denied a full and fair hearing on his claim that counsel suffered from conflicts will be **DISMISSED.**

Claim 21: COMPETENCY TO STAND TRIAL AND AT THE TIME OF THE CRIME

Petitioner claims he was incompetent at the time of the crime and at the time of trial. The state contends and the record confirms that petitioner has failed to present this claim to the state appellate courts.

Thompson is barred from seeking review of these claims in a state court proceeding because he had the opportunity to raise the issues during the course of his direct appeal and post-conviction but failed to do so. *See Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). Absent cause and prejudice, this Court cannot reach the merits of claims that have been procedurally defaulted in state court by a state prisoner in a defendant's direct criminal appeal. *Reed v. Farley,* 512 U.S. 339, 354 (1994). To establish cause Thompson must present a substantial reason to excuse the default. Thompson must also show he was actually prejudiced as a result of the claimed constitutional error. *United States v. Frady,* 456 U.S. 152, 174 (1982); *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir.), *cert. denied,* 516 U.S. 992 (1995).

To establish cause, Thompson must present a substantial reason to excuse the default. Thompson alleges he was denied funding for mental health and investigative experts as cause for his failure to timely raise these issues in his direct appeal, or post-conviction appeal to the Court of Criminal Appeal or to the Tennessee Supreme Court. However, the Court has previously determined that Thompson was provided with funding for mental health experts at the state trial court level and the trial court record reveals that Thompson was competent at the time of the crime and his trial. Thompson's factually unsupported claim, that the state post-conviction court's denial of his motion for funds to hire experts excuses his default, fails to provide cause to excuse his procedural default. Consequently, Thompson's claim is procedurally barred, thereby necessitating the **DISMISSAL** of this issue in his § 2254 petition.

Claim 22: INEFFECTIVE ASSISTANCE OF COUNSEL

Thompson presents twenty-two claims of ineffective assistance of counsel in his § 2254 petition. The state contends only four of the twenty-two claims have been fairly presented to the Tennessee Supreme Court. The state contends petitioner never presented eighteen of the sub-parts of his ineffective assistance of counsel claim to the Tennessee state courts for consideration and has no remedy currently available under Tennessee law to present these claims to the state courts. Therefore, respondent contends petitioner is procedurally barred from consideration of these claims in this habeas proceeding. However, it is the Court's opinion that at least portions of seven of the twenty-two claims have been fairly presented to the Tennessee Supreme Court. Thompson has not procedurally defaulted or waived the issues of ineffective

assistance of counsel on approximately seven of the twenty-two asserted factual bases, specifically portions of sub-parts 1, 2, 3, and 4, and issues 6, 7, and 9 were fairly presented to the Tennessee state courts and adjudicated on the merits. With the exception of these seven claims, Thompson has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Thompson has procedurally defaulted on the other fifteen claims which this Court will address individually.

Petitioner appealed the denial of his post-conviction petition to the Court of Criminal Appeals and claimed his state trial attorneys were ineffective for nine different reasons. *Thompson v. State,* (Addendum No. 18). Specifically, the claims Thompson made to the Tennessee Court of Criminal Appeals that are related to his first four claims of ineffective assistance in this petition, are that trial counsel were ineffective for failure to interview witnesses who could have been beneficial to him, failure to adequately investigate prior head injuries, failure to prepare and present defense witnesses, and by opening the door to damaging evidence during the penalty phase of the trial.

Thompson then appealed the denial of state post-conviction relief to the Tennessee Supreme Court by filing an application for permission to appeal, which was denied. He presented the following question regarding ineffective assistance of counsel for review:

> I. There is a need to secure settlement of important issues of law relating to the standard by which the competence of criminal attorneys is measured.

In support of this claim he argued trial counsel did not warn Ms. Arlene Calajuo of the State's ability to

cross-examine her about Thompson's military history and their decision to use her as a witness was not an informed one. Petitioner also claimed trial counsel was ineffective because at the penalty stage of the trial they used their own psychological testimony to opened [sic] the door to allow unfavorable testimony regarding Thompson's evaluation at Middle Tennessee Mental Health Center. The unfavorable testimony included evidence that Thompson was a malinger who showed no remorse and that he had been violent and disruptive at the facility, Thompson also claimed trial counsel failed to develop proof regarding his previous head injuries.

Federal courts must defer to state court factual findings, according them a presumption of correctness that the petitioner may rebut only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption only applies to underlying basic, primary, or historical facts, and not to mixed questions of facts and law. *Rickman v. Bell* 131 F.3d 1150, 1153 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 1827, 140 L.Ed.2d 962 (1998); *West v. Seabold,* 73 F.3d 81, 84 (6th Cir.), *cert. denied,* 518 U.S. 1027 (1996).

Ineffective assistance of counsel in a petition for habeas corpus review presents a mixed question of law and fact. *West v. Seabold*, 73 F.3d at 84. Therefore, a state court's conclusion counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254 (e)(1). Ineffectiveness is a mixed question of law and fact, not a question of basic, primary, or historical fact. State court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of 28 U.S.C. § 2254(e). However, the performance and prejudice components of the ineffectiveness inquiry, which are mixed questions of law and fact, are not entitled to the deference.

See Rickman, 131 F.3d at 1153-54. To obtain relief, Thompson must show the state court's adjudication resulted in a decision that involved an unreasonable application of clearly established Federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

In order to demonstrate ineffective assistance of counsel, Thompson must not only show his attorney's representation fell below the standard of competence demanded of attorneys in criminal cases, but also, there is a reasonable probability, but for the attorney's unprofessional errors, the result of the proceeding would have been different. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established the criteria for determining whether a Sixth Amendment claim of ineffective assistance of counsel is meritorious.

To establish his attorney was not performing within the range of competence demanded of attorneys in criminal cases, the defendant must demonstrate the attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88; *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The *Strickland* test requires that a defendant demonstrate two essential elements: (1) counsel's performance was deficient, *i.e.*, counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment, and (2) counsel's deficient performance prejudiced the defense, *i.e.*, deprived the defendant of a fair trial rendering the outcome of the trial unreliable. *Id.* at 687-88; *McQueen v. Scroggy*, 99 F.3d 1302, 1310-11 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997); *Sims v. Livesay*, 970 F.2d 1575, 1579-81 (6th Cir. 1992). *See also Flippins v. United States*, 808 F.2d 16, 17-18 (6th Cir.), *cert. denied*, 481 U.S. 1056 (1987). As the Sixth Circuit explained in *United States v. Morrow*, 977

F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993): "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *See also West v. Seabold*, 73 F.3d at 84. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West*, 73 F.3d at 84, *quoting Strickland*, 466 U.S. at 691, *citing Smith v. Jago*, 888 F.2d 399, 404-05 (6th Cir. 1989), *cert. denied*, 495 U.S. 961 (1990). There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Sims*, 970 F.2d at 1579-80.

"Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just." *Austin v. Bell*, 126 F.3d 843, 847 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1526, 140 L.Ed.2d 677 (1998), *citing Strickland*, 477 U.S. at 687; *United States v. Cronic*, 466 U.S. 648, 658 (1984); *McQueen v. Scroggy*, 99 F.3d at 1310-1311. The Count cannot indulge in hindsight, but must instead evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Strickland*, 466 U.S. at 690; *McQueen*, 99 F.3d at 1311. Trial counsel's tactical decisions are particularly difficult to attack. *McQueen*, 99 F.3d at 1311; *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). A defendant's challenge to such decisions must overcome a presumption that the challenged actions might be considered sound trial strategy. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828. Effective assistance of counsel is presumed, and the Court will not generally question matters involving trial strategy. *See*

United States v. Chambers, 944 F.2d 1253, 1272 (6th Cir. 1991), *cert. denied,* 502 U.S. 1112 and 503 U.S. 989 (1992).

To establish the prejudice prong, Thompson must show that absent his attorney's errors, the result of his trial would have been different. *Lynott v. Story,* 929 F.2d 228, 232 (6th Cir. 1991). "[R]eviewing court[s] must remember that 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998), *quoting Strickland v. Washington,* 466 U.S. at 690. The Court must make an independent judicial evaluation of counsel's performance, and determine whether counsel acted reasonably under all the circumstances. *McQueen,* 99 F.3d at 1311; *O'Hara,* 24 F.3d at 828; *Ward v. United States,* 995 F.2d 1317, 1321-22 (6th Cir. 1993); *Sims,* 970 F.2d at 1580-81.

This opinion will, deal with each sub-part *seriatim.* The state contends Thompson procedurally defaulted on sub-parts one through four, except, to the extent that subpart 3 challenges counsel's investigation and preparation of the issue of his prior head injuries which was the only issue that was specifically raised and addressed on the merits by the Tennessee appellate court. This Court will address the first four sub-parts of Mr. Thompson's ineffective of assistance of counsel claim together since they are intertwined and based on the broad allegation that trial counsel failed to investigate his background and mental heath [sic] history. The first four sub-parts of his claim of ineffective assistance of counsel consists of five pages of allegations. To the extent Thompson failed to fairly present any of the claims made in the first four sub-parts of his ineffective assistance claim to the state courts,

this Court cannot address them because he has failed to show cause to excuse his failure to present the claim in the state courts and actual prejudice. *See Gray v. Netherland,* 518 U.S. at 160-161. However, for the reasons that follow this Court finds that the state court's decision did not involve an unreasonable application of established federal law as determined by the United States Supreme Court, nor did it involve an unreasonable determination of the facts in light of the state court evidence.

This Court will address the first four sub-parts of Claim 22 together. The following are the first four sub-parts of Claim 22:

1. **Thompson claims trial counsel failed to perform a reasonable investigation of his background. Counsel at all critical stages failed to reasonably investigate Mr. Thompson's background and mental health history. Petitioner claims they would have discovered that in the years after he graduated from high school, he experienced intermittently, bizarre and delusional thought patterns. Further, they would have discovered his father had a history of severe mental illness.**

2. **Petitioner claims counsel was ineffective for failing to fully investigate and present relevant evidence of his mental health history and to secure adequate expert assistance to defend petitioner, including psychologists, neuropsychological and or neurological experts to statutory mitigating factors under Tennessee law. Petitioner contends he suffered from substantial mental disorders and demonstrable physical brain damage**

which made him unable to conform his behavior to the law.

3. **Counsel failed to discover available evidence of mental illness caused by two serious head injuries. Counsel failed to obtain medical and other important records for the purpose of presenting evidence in mitigation. Experts recently obtained by Petitioner's present counsel have revealed that Petitioner was incompetent under Tennessee law at the time of the crime and throughout court proceedings. Petitioner suffered, and continues to suffer from schizophrenia, delusional thought processes, and an inability to control his actions secondary to frontal lobe organicity.**

4. **Counsel failed to investigate and challenge Petitioner's competency to stand trial as well as his competency at the time of the offense, Testing conducted at MTMHI was unreliable and trial counsel were ineffective in failing to challenge the results from MTMHI.**

The record shows that trial counsel conducted an extensive investigation of Thompson's background and childhood. Although trial counsel were informed of Thompson's alleged head injuries and researched the subject, it does not appear they obtained the medical records showing Thompson was treated for two head injuries. However, Thompson has failed to submit any medical records or proof to this Court that he actually sustained these alleged head injuries or that they resulted in any permanent damage. Thompson claims trial counsel failed to discover his father had a history of severe mental illness. However,

Thompson does not make any showing that failure to discover his father's history of severe mental illness prejudiced him in any way.

Mr. Parsons, one of petitioner's trial counsel, testified that during his interviews with the family members or with Thompson, he was told that Thompson suffered a head injury from a car wreck when he was young, and suffered a head injury as a result of an assault in the military. In addition, Thompson's trial counsel researched closed head injuries but since neither psychological examination revealed any mental illness or mitigating evidence, they made the strategic decision to present Thompson in the most positive light possible. (Addendum 12B, p. 102).

The trial judge found Thompson's trial counsel adequately investigated his background and prior medical history. The trial judge also found Thompson's post-conviction counsel did not present any proof of mental problems on the part of Thompson that would have been a defense to the charge, or that would constitute a shield against execution. The trial judge found trial counsel did not seek expert and investigative assistance regarding alleged head injuries to Thompson during his youth, or testimony as to Thompson's incompetency at the time of his confession because the facts and circumstances did not indicate the necessity for such action. The Tennessee Court of Criminal Appeals concluded Thompson failed to establish that the head injuries had any effect upon his mental stability at the time of the murder or that any type of psychological impairment in general may have existed which would have been mitigating evidence. The state court concluded Thompson failed to demonstrate any prejudice from the failure of trial counsel to further

investigate the head injuries and the evidence did not preponderate against the trial court's findings of effective assistance of counsel. (Addendum No. 18, *Thompson v. State,* C.C.A. No. 01C01-9506-CC-00180, pp. 12-14). The Tennessee Court of Criminal Appeals further found the decision not to further pursue the head injuries was reasonable strategy:

> Trial counsel's decision to emphasize the petitioner's positive qualities rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation. "[T]he fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." *Cooper [v. State],* 847 S.W.2d [521] at 528 [Tenn. Crim. App.1992]. Deference must be given to an informed trial strategy. This court must refrain from second-guessing trial counsel's decision to emphasize the petitioner's positive attributes rather than possible brain damage. Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion.

(Addendum No. 18, *Thompson v. State,* C.C.A. No. 01C01-9506-CC-00180, pp. 13-15),

The record shows there were medical experts who evaluated Thompson and they found no substantial mental disorders nor physical brain damage. Specifically, the team at Central State concluded there was no organicity (brain damage) and Dr. Copple found no indication of brain damage. (Addendum No. 12 B, p. 189). Upon motion of Thompson's trial counsel, Thompson was sent to the Middle Tennessee Mental Health Institute for a forensic mental evaluation prior to trial. (Addendum No. 12 B, pp.

33, 69). Trial counsel, Mr. Parsons and Mr. Richardson, also hired Dr. Copple to testify Thompson had some positive characteristics and had abilities that would be beneficial to society wherever he was because there was virtually no likelihood that another psychiatrist could find mental illness. (Addendum No. 12 B, p. 112). Mr. Parsons acknowledged that once the defense introduced positive evidence about Thompson he knew the state would have the opportunity to introduce negative evidence about Thompson and the only way to prevent that situation would have been to present no evidence during the punishment phase. (Addendum No. 12 B, p. 128). Therefore, to ensure that nothing detrimental came to light, trial counsel would have had to keep Dr. Copple off the witness stand, thereby preventing the jury from hearing any expert proof about Thompson.

Dr. Copple, the clinical psychologist hired by the defense, testified on Thompson's behalf during the penalty phase of his state jury trial. (Addendum. 1 H, pp. 112-143; Addendum 1 I, pp. 2-98). Dr. Copple spent approximately seven hours with Thompson, interviewing and testing him. In addition. Dr. Copple listened to the trial testimony of the people who testified for both sides and spent approximately forty minutes with Thompson during the trial, (Addendum 1 H, p. 127). Although Dr. Copple testified Thompson's arithmetic level was that of a good strong seventh grader and his reading level was a high sixth grade level, he testified Thompson had the ability to succeed at the training offered at an average community college. (Addendum 1 H, p. 130). Dr. Copple further testified Thompson had been successful at completing some college work. On a standard test of reasoning, Thompson scored in about the 64th percentile of high

school graduates, which means that 36 percent of the high school senior males would score higher and 64% would score below him. (Addendum 1 H, p. 133).

Dr. Copple testified Thompson is a sensitive, caring person, who has "this nurturance need to the extreme." (Addendum 1 I, p. 21). Dr. Copple testified he consistently saw strong remorse in Thompson. (Addendum 1 I, p. 31).

When Mr. Richardson was asked if it was true that he did all he could to develop evidence of brain damage, he responded,

> Did try to hire a psychiatrist but that was not successful and it was, you know, it was the type thing it was a theory as to whether to go with his good character and reservoir of moral upbringing, a man with a great deal of ability that could be used in the penitentiary and a life sentencing. I doubt if there will ever be another man on death row that had as good a background as he did. I don't know of any, and then the question as to whether to mix into that or try to accentuate some brain damage that we hadn't been able to spot, but at the same time, probably with some more digging may could have and then give the jury the idea that this man, if he ever gets out of prison with some brain damage, he will kill . . . somebody else, that is kind of counter productive. We went with one strategy and probably if we had to do it over again, would go with the other strategy because that one didn't work.

(Addendum No. 12 B, pp. 193-194).

The record shows Thompson's mental health was investigated and he received adequate expert assistance to attempt to establish valid mitigating factors. The mental

health experts were aware of his behavior and the experts did not find any brain damage and found Thompson was competent, Counsel was aware of Thompson's inappropriate behavior which occurred while he was in the Navy but they made the strategic decision not to introduce that evidence. However, some of the testimony included the problems he had while in the Navy and much of that information was introduced to the jury.

Mr. Parsons testified he and others working on the defense team traveled to Molena, Georgia, and Zebulon, Georgia, and interviewed petitioner's family members, neighbors, teachers, and a preacher. Mr. Parsons testified they obtained all they could of Thompson's military records.

Mr. Parsons testified that based on the overwhelming evidence, they did not think they had a chance of winning the guilt phase. However, rather than enter a plea of not guilty, they chose not to have Mr. Thompson enter any plea for strategic reasons. They wanted the state to go through the guilt phase and put all the proof on and let it settle before going into the punishment phase. They did not want all the proof entered during the punishment phase where it would be fresh to the jury. (Addendum 12 B, pp. 109-110). Mr. Parsons testified trial counsel acknowledged the terrible crime and that the proof showed overwhelmingly that petitioner committed the crime. Trial counsel concluded all they could hope for was that Thompson would receive a life sentence, so they developed a strategy to show the jury that petitioner had "social worth," (Addendum 12 B, p. 110). Mr. Parsons testified that since they could not mitigate the crime, they chose to introduce mitigating evidence at the penalty phase of petitioner's worth as an individual. They attempted to

show petitioner's skills and abilities and that he could be productive to society and in prison.

Trial counsel developed this strategy after receiving the results of a mental evaluation they sought at Central State. Mr. Parsons requested a competency evaluation of Thompson at Central State which resulted in no finding of mental illness, mental defect, nor insanity. (Addendum 12 B, pp. 74, 111). Trial counsel did not want to focus on the fact Thompson had been involved in fights in the military or any violence in his background. Mr. Parsons felt any negative evidence about Thompson should be introduced by the prosecution. (Addendum 12 B, p. 74). Therefore, during the penalty phase, they put on witnesses who testified about petitioner's positive traits. (Addendum 12 B, pp. 37-138). Petitioner's ex-girlfriend who met him after he graduated from high school, was one of the witnesses who testified during the penalty phase of his trial. She testified about their relationship, Thompson receiving stitches in his head after being hit in the head with a crow bar, and generally about Thompson's life during the time she knew him.

In his appeal to the Tennessee Criminal Court of Appeals, petitioner alleged ineffective assistance of counsel for failing to interview witnesses who could have been beneficial to this case, especially during the penalty phase. Specifically, Thompson contended counsel failed to interview his step-father, his attorney in the military, the mother of his co-defendant, a witness who worked with the petitioner after his head injuries, a woman who lived in the residence where the arrest was made, and an employee at the Middle Tennessee Mental Health Institute. The Court of Criminal Appeals of Tennessee observed that Thompson's brief suggested that these witnesses could

have been useful to show head injuries might have contributed to his commission of the offenses. The Tennessee Court concluded that it could not speculate upon the usefulness of the witnesses without the information those witnesses might have provided. The Tennessee Criminal Court of Appeals found that since none of the witnesses testified, Thompson failed to show prejudice. (Addendum No. 18, *Thompson v. State,* C.C.A. No. 01C01-9506-CC-00180).

In the case before this Court, petitioner failed to submit affidavits from the witnesses he alleges would have testified about "petitioner's bizarre behavior." Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Bailey v. Floyd County Bd. Of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). Hearsay evidence is not considered on a motion for summary judgment. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997). Furthermore, trial counsel testified their strategy was to keep out testimony of Thompson's previous violent behavior and show the jury he had some positive qualities. The testimony petitioner contends was not introduced was not the result of ineffective assistance of counsel, but legitimate trial strategy. Although petitioner contends his co-defendant, Joanne McNamara, recalled that while they were waiting to receive money which was being wired "[s]uddenly and without warning or reason, Greg 'snapped' and the events of the crime followed[,]" Thompson does not allege she would have testified for him.

Thompson contends his ex-girlfriend, Arlene Cajulao could have testified about several instances when he "snapped," but because she was not informed about the

nature of the penalty phase only testified about things she felt would help petitioner. First, this Court notes trial counsel and the prosecutor asked the questions, so Ms. Cajulao's testimony was in response to the questions counsel chose to ask. Furthermore, as previously stated, trial counsel's strategy was to present Thompson's positive qualities and behaviors. However, the Court notes Ms. Cajulao did testify about incidents of inappropriate behavior exhibited by Thompson including the fact Thompson was kicked out of the Navy and began demonstrating unusual behavior. She testified as follows:

> Q: From the standpoint of his personal security and safety, did he start demonstrating any unusual behavior after that?
>
> A: Yeah. He would get very paranoid. When we lived together, we had a fern tree growing on the side of the house; and he was constantly chopping the back side of it down. He would tell me when I came home to make sure nobody was standing behind there that might hurt me. If we heard noises in the evening, I would get up and find him walking around the house, thinking somebody might be there. He got very paranoid after that.

(Addendum No. 1 H, Transcript Vol. 18, pp. 55-57).

Ms. Cajulao also testified Thompson was discharged from the Navy. One of the incidents that led to the discharge was Thompson's failure to obey an order of a higher ranking officer. Ms. Cajulao testified that when the officer tapped Thompson on the back while he was drinking water, Thompson turned around and pushed him and dislocated the officer's shoulder. (Addendum No. 1 H,

Transcript Vol. 18, p. 57). Upon cross examination she admitted she knew Thompson was found guilty of wrongfully picking up and throwing the officer to the asphalt deck and breaking his collarbone. (Addendum No. I H, Transcript Vol. 18, pp. 87-88). She further testified on cross examination that she was aware he was found guilty of unlawfully striking a Navy Airman on the chest, and was also found guilty of unlawfully threatening to strike an officer on the head with a torque wrench extension bar. (Addendum No. 1 H, Transcript Vol. 18, pp. 89-90). Additionally, Thompson was found guilty of assault with a deadly weapon when he grabbed a five-inch steak knife and threatened to cut his roommates if they turned the lights on. (Addendum No. 1 H, Transcript Vol. 18, p. 92).

Dr. Copple administered the MMPI to Thompson and testified it did not show Thompson was "crazy." (Addendum 1 I, p. 59). He testified neither he nor Dr. Watson found Thompson to be abnormal or suffering from a mental illness. (Addendum 1 I, p. 58). Dr. Watson found that Thompson malingered schizophrenia and suffered from adult antisocial behavior at the Middle Tennessee Mental Health Institute. (Addendum 1 I, p. 58-61). Adult antisocial behavior was described as behavior that was previously identified as sociopathic. Antisocial behavior includes the inability to sustain a consistent social behavior, lack of conscience or guilt, unrealistically optimistic, and threatening suicide with little likelihood of following through. (Addendum 1 I, pp. 61-63).

Dr. Watson was the clinical psychologist at Middle Tennessee Mental Health Institute involved in Thompson's evaluation. Dr. Watson's deposition was introduced as rebuttal testimony by the state. (Addendum 1 I, p. 144-180). While in the Forensic Services Division at Middle

Tennessee Mental Health Institute Thompson received a medical exam which was a physical, laboratory analysis of urine and blood and serology for venereal disease, chest X-ray, and electroencephalogram. Thompson also received a psychological evaluation and a psychiatric examination. Dr. Watson testified he talked with Thompson on three or four occasions for a total of approximately one and a half hours. Dr. Watson testified Thompson's full-scale I.Q. was 92, which places him in the lower average range intellectually, and indicates there is no intellectual impairment. Thompson's reading level was better than 70% of the test population. (Addendum No. 1 I, pp. 144-151). Dr. Watson testified they primarily gave this test for the purpose of assessing his reading ability because Thompson claimed he could not read or write. (Addendum 1 I, p. 151).

Dr. Watson testified Thompson was given the Bender Visual-Motor Gestalt Test which was a general assessment for brain damage. This test is a drawing test and the professionals are looking for evidence of organicity, which is brain damage. Dr. Watson testified there was a history in his background of a concussion at the age of 16 with reported hospitalizations, and being hit over the head with a hammer while in the military, but they did not have the records. Dr. Watson testified the Bender showed a few errors, but no real evidence of organicity or brain damage. However, to further test this, the Bender Interference Procedure was performed and what they expected was the results of that procedure would be worse than the results obtained on the original test if the person is suffering from organicity or brain damage. However, since they found less errors on the Bender Interference Procedure than on the original, that further strengthened their belief that Thompson did not suffer from any serious organicity.

(Addendum 1 I, pp. 152-153). The lack of brain damage was also seen on the electroencephalogram the interpretation of which was a normal EEG. (Addendum 1 I, p. 156). Dr. Watson testified Thompson appeared to endorse all the psychotic symptoms that he could on the MMPI which drove the score almost off the graph. Therefore, they did not believe there was any clinical evidence of psychosis and found the test result indicated malingering mental illness. (Addendum 1 I, p. 153).

Dr. Watson testified Thompson claimed to hear voices but he only made that claim one time and none of the tests supported his claim of hearing voices. (Addendum 1 I, p. 155). The diagnosis on Thompson was Axis 1, Adult Antisocial Behavior, which is not a mental illness. (Addendum 1 I, p. 162). Dr. Watson further testified he and his colleagues concluded, based upon their examinations and discussions with Thompson, that he showed very little or no emotion or expressions of empathy, and Dr. Watson saw no evidence of remorse. (Addendum 1 I, pp. 164-165). Dr. Watson also testified they found Thompson resisted authority and does what he wants to do. Dr. Watson further testified that Thompson was not suffering from a mental illness which made him harmful to himself or to others but that did not mean that he is not harmful to himself or to others. (Addendum 1 I, p. 169).

During Thompson's state post-conviction hearing, Dr. Gillian Blair, a clinical psychologist who received her Ph. D. from Vanderbilt in 1988, testified on Thompson's behalf. Dr. Blair first became involved in the Thompson case in 1990. (Addendum. No. 12 B, pp. 199-203). Dr. Blair reviewed Mr. Thompson's institutional records, records from the assessment at Middle Tennessee Mental Health Institute, Forensic Services Division, and some records

which were brief and sketchy regarding Thompson's childhood. She reviewed the social history written by the social worker at the Middle Tennessee Mental Health Institute which were mainly based on a written questionnaire completed by Thompson's grandmother. (Addendum No. 12 B, p. 704). Dr. Blair interviewed Thompson on several occasions in March and April of 1992 at Riverbend Maximum Security Institution. (Addendum No. 12 B, p. 206). During those interviews she administered "a basic psychological battery of tests with some additional neuropsych, neuropsychological tests because of the history of head injuries that Mr. Thompson had received and that were well documented in his medical record." (Addendum No. 12 B, p. 206). She was unable to give an opinion as to his present condition at the post-conviction hearing because she had not spoken to him in three years. Dr. Blair reviewed some of Thompson's medical records for 1993 and 1994 from Riverbend prior to testifying at Thompson's post-conviction hearing on March 29, 1995.

Dr. Blair testified that prior to meeting Thompson, her opinion, based on the medical records from Riverbend, was that Thompson had shown a deteriorating mental status and became psychotic. When Dr. Blair saw Thompson in 1992 he was heavily medicated, and she testified he was on Lithium to treat the mood swings, the bipolar disorder; on Haldol, which is an anti-psychotic medication to treat the psychotic symptoms; on Cogentin to minimize the side effects of the anti-psychotic medication; and Ativan to reduce agitation. (Addendum No. 12 B, p. 211). However, review of the 1994 records revealed Thompson was receiving Meilaril, an anti-psychotic medication but on November 25, 1994, he requested he be allowed to discontinue the medication and against medical advice, he

discontinued the medication, and as of January 5 or 15, 1995, he was still off the medication. (Addendum No. 12 B, p. 212). She testified that throughout the Riverbend records "there was some question as to whether [Thompson] accurately fit the diagnostic criteria for [schizoaffective] disorder or schizophrenia or a bipolar disorder, all of which usually begin in early adulthood." (Addendum No. 12 B, pp. 214-215). Dr. Blair stated she could not give any definite opinion as to his present condition nor did she have an opinion about his diagnostic status in 1985. (Addendum No. 12 B, pp. 219-220).

Dr. Blair testified she found similar results to the results found in 1985 and in other areas her results were not consistent with the 1985 results. (Addendum No. 12 B, p. 225). When asked if Thompson's educational achievements and test scores between 100 and 80 percent, were consistent or inconsistent with the person being psychotic, Dr. Blair testified the achievements and scores were consistent with someone who is stable through the administration of medication or through the absence of any psychosis. (Addendum 12 B, pp. 243-247). Dr. Blair stated "I think we have well established that for at least, or more than 12 months prior to the end of November 1994, that Thompson had been stable, that be had been in remission of all of his psychotic symptoms." (Addendum 12 B, pp. 246-247). When asked if she could state with a reasonable degree of scientific certainty whether Thompson was psychotic, schizophrenic, or had a bipolar disorder as he sat in court on March 29, 1995, Dr. Blair responded that to make a diagnosis she would need more than to just look at him, but he looked as if he was stable at that time. (Addendum No. 12 B, p. 248).

Petitioner claims experts recently obtained by him have revealed that he was incompetent under Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide the proof of these revelations. The Court has read the deposition of Dr. Crown. (Court File No. 11, Exhibit 1) but was unable to located [sic] his opinion that Thompson was incompetent at the time of the crime and throughout his court proceedings. As a matter of fact, Dr. Crown stated he was not asked to render any determination about whether or not Thompson was competent during his state jury trial. (Court File No. 91, Exhibit 1, pp. 7-9). Dr. Crown stated he was only asked to make a competency determination at the time he met Mr. Thompson on June 12, 1998. After meeting with Thompson for two and a half to three hours, which consisted of taking a brief history for twenty-five to thirty minutes and the remainder of the time was spent administering tests, it was his opinion that Thompson was competent on June 12, 1998. (Court File No. 91, Exhibit 1, p. 7-47).

Dr. Crown did testify Thompson had a significant auditory processing deficit which means he is easily distracted by external auditory stimuli. (Court File No. 91, Exhibit 1, p. 20). He further testified that some of the test results led him to conclude there was some sort of organic brain damage. However, he is not able to make any assessment of the severity of the damage nor does he intend to make such an evaluation. (Court File No, 91, Exhibit 1, pp. 24-28). Dr. Crown, believes this organicity is secondary to a thought disorder which he refers to as a schizoaffective disorder-bipolar subtype with organic components. Dr. Crown bases his conclusion on the reports of the people who have treated Thompson for the last fourteen

years. (Court File No. 91, Exhibit, 1, pp. 31-32). Dr. Crown did not administer a specific malingering test to Thompson. (Court File No. 91, Exhibit, 1, p. 35).

Respondent hired Dr. Blau to rebut Dr. Crown's testimony. Portions of Dr. Blau's testimony have been filed with the Court. Dr. Blau testified he did not observe or see any indications of organic brain damage on the test he administered. Dr. Blau found Thompson's responses during testing were rational and appropriate. (Court File No. 89, Attachment C, pp. 31, 47-48).

Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Bailey v. Floyd County Bd. Of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). Hearsay evidence is not considered on a motion for summary judgment. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir 1996), *cert. denied,* 117 S. Ct. 683 (1997). Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.

Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial. Additionally, the record shows that trial counsel did reasonably investigate Thompson's background and mental health history.

Accordingly, to the extent Thompson did not procedurally default on sub-claims one through four of Claim 22

– Ineffective Assistance of Counsel, this Court finds petitioner has failed to show that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court, nor did it involve an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart numbers one though four of Claim 22 regarding counsel's failure to investigate are without merit and will be **DISMISSED.**

In sub-part five of Claim 22 – Ineffective Assistance of Counsel, Thompson alleges counsel failed to impeach the credibility of Thompson's confession by presenting evidence to establish that Thompson's description of the murder was inconsistent with the physical facts and the confession was taken in violation of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. In sub-part six of his ineffective assistance of counsel claim, Thompson contends trial counsel failed to object to clearly inadmissible and prejudicial hearsay regarding whether Thompson, after first invoking his right to counsel, initiated a conversation with a Georgia prosecuting attorney. The respondent contends Thompson procedurally defaulted on issue five and has failed to demonstrate the state court's decision on sub-part six was contrary to or was the result of an unreasonable application of established federal law as determined by the United States Supreme Court, or involved an unreasonable determination of the facts in light of the evidence.

Thompson has procedurally defaulted on sub-part five, and since he has failed to show cause and prejudice for his procedural default, this Court cannot address this issue and it will be **DISMISSED**. Sub-part six addresses

the suppression of his confession which has been properly presented to the highest Tennessee state court.

Thompson claims trial counsel was ineffective for failing to object to inadmissible prejudicial hearsay that Thompson initiated a conversation with a Georgia prosecuting attorney after he invoked his right to counsel. (Court File No. 17, Claim 22, p. 25). Although Thompson fails to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, and he fails to identify the "inadmissible, prejudicial hearsay," the Court presumes he is claiming trial counsel was ineffective for failing to object to TBI Agent Jerry Eubanks' testimony at the suppression hearing.

Thompson raised the issue of Eubank's testimony during his state post-conviction proceedings. During his state post-conviction proceedings, Thompson specifically claimed counsel was ineffective for failing to object to the following testimony of TBI Agent Jerry Eubanks: "I remember Detective Graham coming out of the interview room and telling the Attorney General that Gregory Thompson wanted to talk with him." (Addendum No. 1 B, p. 92); *also see State v. Thompson*, 958 S.W.2d 156, 162 (Tenn. Crim. App. 1997). The Tennessee Court of Criminal Appeals found that Thompson failed to demonstrate any prejudice from the failure to object to the hearsay. Specifically, the Court found that Thompson testified during the suppression hearing that he wanted to talk with the District Attorney again. *Id. at* 162-163).

Prior to trial, defense counsel for Thompson filed a motion to suppress statements he made to law enforcement officials. (Addendum No. 1 B, p. 12). When asked on

cross-examination, "[f]inally you told Detective Graham . . . that you wanted to see that lawyer [the District Attorney] again[,]" Thompson responded "[y]es." *Id.* at 162, (Addendum No. 1 B, p. 46). Later in the hearing during cross examination the following colloquy takes place:

> Q: . . . Then you tell Graham that you want to talk to him (the District Attorney) again, didn't you?
>
> A: Yes sir, after he came in.
>
> Q: You told somebody, at least, I say Graham – the man who just walked in the courtroom – you told him that you wanted to talk to that District Attorney?
>
> A: Yes.
>
> Q: And that's when he came back in and you drew him a map.
>
> A: Yes sir.

(Addendum No. 1 B, p. 53-54).

The Tennessee Court of Criminal Appeals found that Thompson acknowledged he reinitiated contact with the District Attorney and the hearsay evidence at issue was not necessary to establish that fact. Thus, they found there was no showing of prejudice.

This Court has reviewed the transcripts and finds Thompson has failed to show any prejudice from counsel's failure to object to this hearsay. Thompson was the first to testify at the suppression hearing and Thompson testified he told Graham he wanted to talk with the District Attorney again. (Addendum No. 1 B, pp. 53-54). This Court agrees with the state court's determination of the facts in

light of the evidence. Further, there is nothing in the record to indicate that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, sub-part six of Claim 22 is without merit and will be **DISMISSED.**

Sub-part seven is an allegation that counsel failed to properly prepare the defense witnesses and failed to properly cross-examine the state's witnesses. Specifically, Thompson claims trial counsel's failure to properly examine Dr. Watson, Arlene Cajulao, and Nora Jean was due to lack of resources and due to defense counsel being uninformed. Thompson does not set forth the facts to support this claim nor does he specify what trial counsel should have done to remedy the alleged inadequacy. This Court is unable to determine what Thompson's specific complaint is.

During his state post-conviction proceedings Thompson claimed trial counsel failed to properly prepare Arlene Cajulao to testify. The state contends only the claim as to Ms. Cajulao is properly before this Court and Thompson procedurally defaulted on the remainder of the claim because he failed to present it to the Tennessee Supreme Court. The Court agrees the issue of inadequate preparation as to other witnesses was not presented to the state courts. The Court presumes Thompson is alleging that if trial counsel had spent more time with the witness, his negative military history could have been avoided as he alleged in his state post-conviction proceeding. The Tennessee Court of Criminal Appeals found that trial counsel realized cross-examination of Ms. Cajulao might be risky but they also realized their only other option would have been to present no mitigating evidence at all.

The Court has reviewed the transcripts and finds that defense counsel was aware of the possible dangers inherent in the cross-examination of Ms. Cajulao when they made the tactical decision to present her positive testimony anyway. The strategy was based on adequate preparations and Thompson has not overcome the presumption of sound trial strategy. This Court agrees with the Tennessee Court of Criminal Appeals finding that "trial counsel had little choice but to present as much mitigating evidence as possible even though there were risks inherent in that strategy." *Thompson v. State,* 958 S.W.2d at 165. Thompson does not allege nor does the record show that additional preparation time with the witness would have prevented the state from effectively cross-examining her about Thompson's military background. Thompson has not shown that trial counsel was ineffective for failing to properly prepare Ms. Cajulao.

Thompson claims that trial counsel failed to properly examine other witnesses. He fails to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, and this Court does not find the remaining part of this issue addressed by any of the state courts. Accordingly, the remaining portion of this claim will be **DISMISSED.**

In sub-part eight, Thompson claims counsel failed to research and discover the alleged devastating consequences of counsel's agreement with the prosecution to read a deposition into the record and to forsake his confrontation clause rights as to psychiatric expert testimony. Thompson has failed to allege prejudice or provide facts supporting this claim. On his appeal of his state post-conviction petition to the Tennessee Court of Criminal

Appeals, Thompson claimed counsel was ineffective by allowing a deposition to be used rather than requiring the state witness, Dr. Robert Glenn Watson, to appear at the penalty phase of the trial. However, when he filed his Application for Permission to appeal to the Tennessee Supreme Court he failed to appeal this issue. The state contends Thompson procedurally defaulted this issue and this Court agrees. Thompson has not submitted any evidence to show cause and prejudice to excuse this default. Accordingly, subpart 8 will be **DISMISSED** due to Thompson's failure to raise it in the highest Tennessee court.

In subpart nine, Thompson claims "[c]ounsel failed to research and discover the effect of offering the testimony of Dr. Copple on the scope of the State's rebuttal." (Court File No. 17, p. 25). When Thompson appealed the denial of his state post-conviction petition to the Tennessee Court of Criminal Appeals he claimed trial counsel was ineffective when they opened the door to devastating evidence by asking Dr. Copple about Thompson's good qualities. When Thompson appealed to the Tennessee Supreme Court he claimed trial counsel did not make an informed tactical decision to use or not use their own psychological testimony because trial counsel did not know that the records of the psychological exam at Middle Tennessee Mental Health Center could be used against Thompson at the penalty phase to rebut their psychological testimony. (Addendum No. 18, p. 13). The state contends the petitioner has failed to demonstrate that the state courts decision was an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence.

Thompson claims trial counsel failed to research and discover that by offering the testimony of Dr. Copple they opened the door which allowed the state to present damaging evidence in rebuttal but he does not show any prejudice. This issue was raised in Thompson's state post-conviction petition and presented to the Tennessee Court of Criminal Appeals and his Rule 11 Application for Permission to Appeal to the Tennessee Supreme Court.

Thompson does not claim the state court's decision was an 'unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. A review of the record shows neither attorney expected the state to be able to use the information acquired by MTMHI. However, Mr. Parsons acknowledged he knew that positive testimony by Dr, Copple would open the door for the state to present negative information. It was trial counsel's strategy to emphasize positive attributes of the petitioner and that he could lead a productive life in prison. If any witness testified about the petitioner's good character, the state would have been entitled to rebuttal. The only other option would have been to present no proof at all. Trial counsel chose a strategy and based on the test results and Thompson's history this Court cannot find that trial counsel's decision to pursue this strategy was ineffective assistance of counsel. Moreover, the jury found three aggravating factors, and this Court cannot conclude that the outcome would have been different if the jury had not heard the evidence regarding Thompson's testing at MTMHI.

Thompson has not shown that the state court's decision was an unreasonable application of established federal law as determined by the United States Supreme

Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart nine will be **DISMISSED** as meritless.

In subpart ten, Thompson claims trial counsel failed to consult with him at crucial stages during all prior proceedings. Thompson has failed to identify the crucial stages when counsel failed to consult with him. Thompson has done nothing more than make a boilerplate complaint with no supporting cases or relevant facts giving rise to this claim. The state claims petitioner failed to present this [sic] claims to the state appellate courts. Not only has Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, Thompson has failed to identify the crucial stages when counsel failed to consult with him. Moreover, Thompson has procedurally default [sic] this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart ten will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

In subpart eleven, Thompson claims "[c]ounsel failed to adequately object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading or inaccurate statements concerning the law, the evidence or the petitioner during voir dire, opening, direct examination, cross examination, closing, and rebuttal closing at the guilt phase of petitioner's trial, and during opening, direct examination, cross examination, closing and rebuttal closing at the penalty phase of petitioner's trial, as well as during out of court communications between counsel." The state claims subpart eleven is not sufficiently pled

because Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial counsel for failing to object to prosecutor's statements. There is not a discussion of the relevant facts giving rise to this claim, nor are there any citations to federal or state cases, much less an explanation of their respective holdings. Furthermore, Thompson failed to present this issue to the Tennessee state courts. Thompson has procedurally defaulted this claim because he failed to raise the issue in state court, or he has failed to show cause and prejudice for his procedural default. Accordingly, subpart eleven will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

Thompson next claims, in subpart twelve, counsel was ineffective for failing to immediately advise the court of a racist comment made by Assistant District Attorney General Luna. The state claims Thompson procedurally defaulted on this claim. Although, the Tennessee Court of Criminal Appeals addressed the issue of whether counsel was ineffective for failing to question the assistant district attorney at the motion for new trial about racist remarks, Thompson did not raise this issue in the Tennessee Supreme Court. The result is procedural default. Additionally, Thompson has not shown any prejudice due to this alleged failure. Accordingly, subpart twelve will be **DISMISSED** due to Thompson's procedural default and failure to show cause and prejudice for his default.

Subpart thirteen consists of a claim that counsel failed to prepare adequately for either the guilt phase or the penalty phase of trial and to develop and present to

the jury a coherent theory of defense at either phase. Thompson claims trial counsel failed to understand the significance of the "negative" information about his behavior and failed to make a reasonable strategic decision because counsel was not fully informed of Thompson's mental health. The state contends Thompson procedurally defaulted on this issue and failed to show cause and prejudice. Thompson failed to fairly present this claim in state court. In his post conviction appeal to the Tennessee Supreme Court, Thompson claimed trial counsel did not make informed strategic decisions regarding introduction of certain testimony because counsel did not know the law. In the claim before this Court, Thompson claims trial counsel failed to understand the significance of certain testimony because they were not fully informed about Thompson's mental health. Thompson failed to fairly present this issue to the Tennessee Supreme Court. Thompson procedurally defaulted on this issue and has failed to show cause and prejudice for his procedural default. Accordingly, subpart thirteen will be **DISMISSED.**

In subpart fourteen, Thompson contends trial counsel lacked the experience and knowledge to effectively represent him in a death penalty case. The state contends petitioner has failed to show that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Thompson must show that counsel's lack of death penalty experience prejudiced him. Thompson does not contend and the Court does not find any statute or case which requires that counsel who represent defendants subject to the death

penalty be represented by counsel who have any specialized death penalty experience.

The Court has read the record and notes that trial counsel filed numerous motions and vigorously defended Thompson at trial. Mr. Richardson and Mr. Parsons had each actively practiced law for twenty or more years and both had trial experience with serious felony cases. They made strategic choices to represent Thompson in the most positive light possible.

The fact that Mr. Parsons had never been involved in a murder case prior to Thompson's does not rendered [sic] his assistance ineffective. Mr. Parsons testified in preparation of Thompson's trial, he traveled to Thompson's hometown of Molena, Georgia, and to another little town, Zebulon, Georgia, and interviewed family and others who knew Thompson (Addendum 12 B, p. 37). Mr. Parsons asked the witnesses if they knew anyone else who might know something about Mr. Thompson. (Addendum 12 B, p. 149). Mr. Parsons testified he was aware of two alleged head injuries and believes he wrote for the medical records but never received them. Mr. Parsons further testified he obtained all of Thompson's military records he was able to get. Mr. Parsons felt in order to make the head injuries significant or relevant, they would have needed some expert proof and they did attempt to develop that proof by having Thompson tested. They also hired their own expert Dr. Copple. Mr. Parsons testified he went to an "absolutely superb" Capital Resource Seminar which lasted several days.

Mr. Doyle Richardson, Thompson's other trial attorney, testified that about ten percent of the cases he handled were criminal. Mr. Richardson had been involved in

three or four first-degree murder cases. Mr. Richardson testified they filed every motion they could think of to file. He testified they thoroughly investigated the facts of the case to the best of their ability and in accordance with their strategy. (Addendum 12 B, p. 189). He testified they did everything they knew how to do and thought their defense was as thorough as it should have been other than not thoroughly investigating the head injury. (Addendum 12 B, p. 192).

The Tennessee Court of Criminal Appeals did not find any prejudice due to trial counsel's lack of experience in capital cases. Thompson has not shown that trial counsel were ineffective or that Thompson was prejudiced in any way. Thompson does not show that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart fourteen will be **DISMISSED** as meritless.

Subpart fifteen consists of a claim that counsel failed to challenge for cause jurors whose opinions would lead them to impose the death penalty in every case or those jurors whose views would prevent or substantially impair the performance of their duties as a juror. The state contends Thompson procedurally defaulted on this issue and failed to show cause and prejudice.

Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial

counsel for failure to challenge jurors. Thompson does not identify which jurors counsel failed to challenge. There is no discussion of the relevant facts giving rise to this claim. There are no citations to federal cases, much less an analysis of their respective holdings. Furthermore, Thompson failed to present this issue to the Tennessee state courts. Thompson has procedurally defaulted this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart fifteen will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

Subpart sixteen claims trial counsel failed to adequately challenge for cause those jurors who by their answers showed some type of bias against the petitioner, his case, and/or class to which the petitioner belongs. The state contends Thompson procedurally defaulted on this issue and failed to show cause and prejudice. Additionally, the state claims Thompson failed to sufficiently plead this claim with the specificity required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial counsel for failure to challenge jurors. Again, Thompson fails to identify the jurors who were not adequately challenged. There is no discussion of the relevant facts giving rise to this claim; and there are no citations to federal cases, much less an analysis of their respective holdings. Furthermore, Thompson failed to present this issue to the

Tennessee state courts. Thompson has procedurally defaulted this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart sixteen will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

In subpart seventeen, petitioner claims trial counsel failed to file or adequately argue necessary motions before, during, and after trial, on direct appeal or on post-conviction. The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice. The state also claims Thompson has failed to sufficiently plead this claim with the specificity required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial counsel.

Thompson fails to identify the motions at issue and discuss the relevant facts giving rise to his claim. There are no citations to federal cases, much less an analysis of their respective holdings. Furthermore, Thompson did not present this issue to the Tennessee state courts. Thompson has procedurally default [sic] this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart seventeen will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

In subpart eighteen, Thompson claims trial "[c]ounsel failed to object to jury instructions at the penalty phase which shifted the burden of proof to petitioner to show the existence of mitigating circumstances and comments in closing on the Defendant's failure to provide a defense." The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

Thompson did not present this issue to the Tennessee state courts. Thompson has procedurally default [sic] this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, subpart eighteen will be **DISMISSED** on the grounds of procedural default.

Thompson contends in subpart nineteen that trial counsel were ineffective because they failed to object to the jury's consideration of the impact of the crime on the victim, the victim's family, society and/or the victim's social, moral, or religious worth. The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

Thompson did not present this issue to the Tennessee state courts. Thompson has procedurally default [sic] this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, subpart nineteen will be **DISMISSED** on the grounds of procedural default.

In subpart twenty, Thompson claims trial counsel were ineffective for failing to have the court instruct the jury on the effect of their inability to agree on a sentence of death and/or the meaning of a life sentence or the petitioner's eligibility for any release. The state contends

petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

The United States Supreme Court recently held in *Jones v. United States*, 119 S.Ct. 2090, 2098-2100 (1999), that a defendant is not entitled to a jury instruction that the jury's failure to reach a unanimous sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without the possibility or release. Although the sentencing structure for death penalty cases was slightly different in 1985, in that life imprisonment without parole was not one of the possible sentences, the fact that the Eighth Amendment does not require the jury be instructed as to the consequences of their inability to agree renders this issue meritless. Moreover, Thompson failed to present this issue to the highest Tennessee state court. Thompson has procedurally default [sic] this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, subpart twenty will be **DISMISSED** on the grounds of procedural default.

Subpart twenty-one claims trial counsel failed to present evidence that Thompson could live a meaningful and productive life in prison. The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

The Court notes that Thompson earlier claimed ineffective assistance of counsel because Dr. Copple testified about positive attributes of Thompson to assist their strategy of presenting Thompson in a favorable light with worthiness and abilities to be productive in jail instead of being executed. Now Thompson claims there

was no evidence introduced to show he could live a meaningful and productive life in prison. However, this Court will not address these inaccurate allegations because Thompson failed to present this issue to the highest Tennessee Court and has failed to show cause and prejudice for his procedural default. Accordingly, subpart twenty-one will be **DISMISSED** on the grounds of procedural default.

The last claim under ineffective assistance of counsel is subpart twenty-two alleging counsel failed to properly and fully raise any or all of the claims in this petition either at trial, on direct appeal, or in post-conviction proceedings. During oral argument on the motion for summary judgment, Thompson's counsel stated "[c]laim 22 is simply a cumulative error claim, not necessarily an independent claim . . . " (Motion Transcript, p. 89). The state claims petitioner procedurally defaulted on this issue and has failed to show cause and prejudice.

Thompson failed to present this issue to the highest Tennessee Court and has failed to show cause and prejudice for his procedural default. Accordingly, subpart twenty-two will be **DISMISSED** on the grounds of procedural default.

Claim 23: STATE PROCEDURES VIOLATING EQUAL PROTECTION

Thompson claims the State of Tennessee violated his equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution in two ways. His first claim is that his rights were violated when the Tennessee courts removed the Honorable Buddy D. Perry who had been duly appointed and was removed without appropriate cause. The state contends this claim

fails to state a claim for habeas relief because it is a matter that addresses state post-conviction procedure and has nothing to do with the petitioner's conviction or sentence.

As the Court previously stated, the writ of habeas corpus is not the proper means by which a prisoner should challenge errors or deficiencies in state post-conviction proceedings because these claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration. *Kirby v. Dutton,* 794 F.2d 245, 247 (6th Cir. 1986). "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellants claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself . . . Infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief." *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984). Accordingly, subpart a of Claim 23 will be **DISMISSED** for failure to state a federal constitutional claim cognizable in a federal habeas proceeding.

In subpart b of Claim 23, Thompson claims the trial court erroneously appointed the foreman of the grand jury, in violation of mandatory state law, where there had been no election of the presiding judge in the 14th Judicial Circuit. The state contends the claim is procedurally defaulted because the issue was presented to the highest state court as a violation of a state statute and not as a federal constitutional issue.

Petitioner raised this issue in the Tennessee Supreme Court as an issue of state law not constitutional law. He claimed the trial court erred in failing to grant the motion

to dismiss his indictment for all the reasons set out in the pretrial motion they filed and because the statute, TENN. CODE ANN. § 16-2-509, is mandatory. (Addendum No. 2, p. 71-74). The reasons stated in the pre-trial motion were based on Tennessee statutes. "[T]he habeas petitioner must present his claim to the state courts as a federal constitutional issue – not merely as an issue arising under state law." *Prather v. Rees*, 822 F.2d 1418, 1420 (6th Cir. 1987), *quoting Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). Thompson raised this claim in state court as a state law question and therefore, the federal constitutional violation allegedly caused by the state court's disposition of this question was not exhausted. *See Id.* at 1420; *Dougan v. Ponte*, 727 F.2d 199 (1st Cir. 1984). Thompson has procedurally defaulted on this issue and he has failed to show cause and prejudice for his default. Accordingly, this claim will be **DISMISSED** on the ground of procedural default.

Claim 24: UNCONSTITUTIONAL GUILT PHASE JURY INSTRUCTIONS

Thompson claims the jury instructions at the guilt phase violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Thompson claims the unconstitutional jury instructions include, but are not limited to, subpart a and b. The state contends Thompson raised the issue as an issue of state law and it was never raised to highest state court as a constitutional violation.

"To warrant habeas relief, the jury instructions must have been so infirm that they rendered the entire trial fundamentally unfair. An ambiguous, potentially erroneous instruction violates the Constitution only if there is a

reasonable likelihood that the jury has applied the instruction improperly." *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 120 S. Ct. 110 (1999), *citing Estelle v. McGuire*, 502 U.S. 62 (1991); *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1526 (1998).

To the extent Thompson is attempting to attack jury instructions other than the two specified charges, the claim is **DISMISSED** for failure to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Subpart (a) claims the jury instruction on first degree murder and lesser included offenses failed to make sufficient distinctions between first and second degree murder and voluntary manslaughter and omitted many of the defenses of second degree murder. The Tennessee Supreme Court was unable to address this issue because it was presented without argument. However, the Court stated some of the issues, including this issue had no obvious merit. The Court finds Thompson did not raise this alleged constitutional violation in state court. Accordingly, this claim will be **DISMISSED** on the ground of procedural default.

Thompson claims in subpart (b) that the trial court gave an unconstitutional jury instruction when it instructed, in violation of state law, that deliberation can be formed in an instant. The state claims Thompson has failed to raise this claim as a constitutional claim to the highest Tennessee court and therefore, has procedurally defaulted. Thompson claims it was raised on state post-conviction as a federal constitutional claim and was presented to all courts. However, this Court does not find

that petitioner raised it as a federal constitutional claim state court. Even his application for permission to appeal to the Supreme Court on post-conviction addresses it in terms of state law and fails to cite any federal constitutional violation or cite any federal case law.

The petitioner failed to cite to the record directing the Court to the specific jury instruction he is challenging. The Court presumes petitioner is challenging the jury instruction requiring the state to prove beyond a reasonable doubt that "the killing was deliberate; that is, with cool purpose[.]" (Addendum 1H, p. 103); and the instruction that "[p]remeditation means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexists in the mind of the accused for any definite period or time. It is sufficient that it preceded the act, however, short the interval. (Addendum 1H. p.105).

This attempt to create a constitutional claim, is based on a misrepresentation of the text of the instruction. As can be seen, this instruction did not specifically state that "deliberation can be formed in an instant." Accordingly, petitioner is attacking an instruction that was not given.

Furthermore, even if the Court construes the claim as a coherent attack on the constitutionality of this instruction, the claim suffers from at least four defects. Although Thompson raised the jury instruction in the state court, he relied purely on *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), and raised it only as an issue of state law. In *Thompson,* 958 S.W.2d at 173, the Tennessee Court of Criminal Appeals discussed the case of *State v. Brown,* 836 S.W.2d 530 (Tenn.1992), when it addressed Thompson's

claim that the erroneous jury instructions defining deliberation and premeditation required reversal. In *State v. Brown,* 836 S.W.2d 530, the court held that trial courts should no longer instruct juries that the premeditation required to sustain a conviction for first degree murder can be "formed in an instant." *Brown* did not address the constitutionality of instructions regarding a murder's instantaneous deliberation or premeditation. *Brown reaffirms that "no specific period of time need elapse between the defendant's formulation of the decision to kill and the execution of that plan."* In *Brown,* the Tennessee Supreme Court merely disapproved specific instructions that "premeditation may be formed in an instant" as part of its requiring Tennessee courts to observe the distinction between the elements of premeditation and deliberation. *Id.* at 543. By citing to this state law analysis, however, petitioner did not raise a federal claim of a due process violation. Any attempt to raise one now is barred by this procedural default. Moreover, reliance on *Brown* simply does not raise a cognizable federal claim, but merely a claim under state substantive law. In order to exhaust this issue, Thompson was required to raise the claim as a constitutional claim, not as an issue of state law to the highest state court. *Prather v. Rees*, 822 F.2d at 1420; *see also Koontz v. Glossa*, 731 F.2d at 368; *United States v. Fairman,* 707 F.2d 936, 940-41 (7th Cir. 1983). Thompson failed to raise this alleged violation as a constitutional issue in state court, and he has failed to show any cause and prejudice for this procedural default.

Furthermore, the Tennessee Court of Criminal. Appeals noted in *Thompson*, that *Brown* was decided after petitioner was convicted in this case; and the Tennessee Supreme Court has repeatedly held that *Brown* did not

announce a new constitutional principle. Accordingly, retroactive application is not permissible. *See, e.g., Lofton v. State*, 898 S.W. 2d 246, 250 (Tenn. Crim. App. 1994) (citing three unpublished cases holding *Brown* does not apply retroactively). Accordingly, petitioner's attempt to craft a federal procedural right out of this state court decision also runs afoul of *Teague's*[10] prohibition on non-retroactive application of new constitutional rules of criminal procedure.

Finally, any error is obviously harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The evidence at trial clearly demonstrated that petitioner took far longer than "an instant" to prepare for and carry out the murder. On direct appeal the Tennessee Supreme Court found the proof showed a particularly senseless killing based on the following facts which show it took longer than "an instant" to prepare for and carry out the murder:

> The victim was driven some distance into rural Tennessee, stabbed multiple times and left alive, conscious, and alone to die on a winter night. It is highly probable she knew her fate in advance. There is evidence she was crying, and Defendant stated they circled a church off the rural road on the way to the scene of the stabbing. Although the physical evidence does not show the victim was struck by the wheels of the car, Defendant's statement that he drove the car over her body because she was still alive, and presumably to ensure her death, especially indicates a callous disregard for life. . . .

State v. Thompson, 768 S.W.2d 239 (Tenn. 1989).

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[10] *Teague v. Lane*, 489 U.S. 288, 297-99 (1989).

The preparation here distinguishes this case from *Brown*, in which the only evidence of these elements in *Brown* was repeated blows. *Brown* reversed the conviction on the basis of the lack of evidence of premeditation and deliberation, not because of a faulty jury instruction. The discussion of jury instructions was simply administrative guidance for future trials in the Tennessee courts. Accordingly, *Brown* does not support a constitutional attack on this instruction. Petitioner has failed to show that the instruction had a "substantial and injurious effect" on the jury's decision.

Accordingly, this claim will be **DISMISSED.**

Claim 25: UNCONSTITUTIONAL PENALTY PHASE JURY INSTRUCTIONS

Thompson claims the jury instructions at the penalty phase violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United State [sic] Constitution. Thompson claims the unconstitutional jury instructions include, but are not limited to, the six he listed. To the extent he challenges jury instructions that he failed to list, the claim will be **DISMISSED** for failure to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Thompson first challenges the instructions regarding the aggravating circumstances:

> **(a) Instructions on aggravating circumstances which were unconstitutionally vague and overly broad as applied in petitioner's case and which did not adequately channel the jury's discretion and invited arbitrary, capricious,**

and inconsistent applications of the death penalty.

The state contends Thompson procedurally defaulted on this claim. Thompson has failed to specifically set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Although the Court afforded Thompson the opportunity to file a supplemental brief after the hearing on the state's motion for summary judgment and the Court specifically told petitioner's counsel, "[i]f you're serious about this one [Claim 25], you need to tell us what instructions you're talking about . . . and what you say is constitutionally infirmed [sic] about them[,]" petitioner's counsel failed to specify the instruction he is challenging and the Court is unable to determine the specific instructions he is challenging. The Court notes in Thompson's direct appeal the Tennessee Supreme Court concluded that as to matters pertaining to capital sentencing, the jury was correctly and adequately instructed.

The Court has read the jury instructions where the trial court informed the jury that the death penalty could not be imposed unless the jury unanimously found one or more of three specified statutory aggravating circumstances had been proven beyond a reasonable doubt. Thompson does not identify any other specific instruction that should have been given. Furthermore, Thompson does not show that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart (a) will be **DISMISSED.**

Thompson fails to identify the specific instruction, in subpart (b) that he is challenging:

(b) Instructions which violated the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988).

The state claims Thompson procedurally defaulted on this issue except that as it addresses and [sic] Eighth Amendment claim which the Tennessee Supreme Court has addressed. The Tennessee Supreme Court found that the jury instructions regarding how the jury was to determine the sentence did not include any of the objectionable features of the instructions in *Mills*.

Presumably, Thompson is arguing there was a probability the jurors believed they could only consider those mitigating circumstances they unanimously agreed were present. In *Mills v. Maryland,* 486 U.S. 367 (1988), the Supreme Court held the following instruction was impermissible: "Based upon the evidence we unanimously find that each of the following mitigation circumstances which is marked "yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence."

In *Mills v. Maryland,* the controversy was over section II and III of the verdict form. The pertinent parts are as follows:

II.

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exits [sic] by A PREPONDERANCE OF THE

EVIDENCE AND EACH MITIGATING CIRCUMSTANCE MARKED 'NO' HAS NOT BEEN PROVEN BY A PREPONDERANCE OF THE EVIDENCE:

III.

Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked 'yes' in Section II outweigh the aggravating circumstances marked 'yes' in Section I.

The United States Supreme Court concluded that there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills v. Maryland,* 486 U.S. at 382 (1988).

The instructions in the case before this Court consist of an unanimity instruction with regard to aggravating factors, but not with regard to mitigating ones. The following is the pertinent portion of the jury instruction regarding aggravating and mitigating factors:

> No death penalty shall be imposed unless you find unanimously that one or more of the following specified statutory aggravating circumstances has been proved on the trial and/or on the sentencing hearing beyond a reasonable doubt: . . .
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated, any mitigating

> circumstances which shall include but not be limited to the following: . . .
>
> Thus, mitigating circumstances surrounding a criminal offense are those circumstances which tend to ameliorate or lessen the apparent badness of the particular crime in questions or the apparent badness of the particular defendant. Because different people may have different views about what tends to ameliorate or mitigate any particular offense, the law provides that you may weigh and consider any and all circumstances which you feel tend to mitigate the offense in question. There are eight statutory mitigating circumstances listed for your consideration, but you are in no way limited to these; and you are free to consider any other mitigating facts or circumstances. The law does not require you to list or specify what mitigating circumstances you find, weigh, or consider. You are further instructed as to mitigating circumstances that you may find that one or more mitigating circumstance, which you deem important, outweighs any or all of the aggravating circumstances you may have found.

(Addendum No, 1 I, pp. 80-81).

On direct appeal, the Tennessee Supreme Court found that the jury instructions in Thompson's case did not include any of the objectionable features of the instructions in *Mills.* The Tennessee Supreme Court found that "[t]he trial court emphasized the juror's autonomy in considering mitigating evidence by instructing, '[b]ecause different people may have different views about what tends to ameliorate or mitigate . . . you may weigh and consider any and all circumstances which you feel tend to

mitigate the offense or defendant in question.'" *Thompson v. State,* 768 S.W. 2d 239, 250 (Tenn. 1989).

Thompson failed to identify the specific instruction he contends violated the United States Supreme Court's decision in *Mills v. Maryland*, or provide an instruction that should have been given. This Court has reviewed the instructions given to the jury in petitioner's case and finds that they are not constitutionally infirm. In *Mills*, the jury was required to agree unanimously that a particular mitigating circumstance existed. By contrast, in petitioner's case, unanimity was required only for a finding that no mitigating circumstances outweighed the statutory aggravating circumstances in order for the death penalty to be imposed. "If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death." (Addendum No. 1 I, p. 81). The state court's decision was not contrary to, nor did it involve, an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (b) will be **DISMISSED.**

In subpart (c) of Claim 25, Thompson claims the following instruction was unconstitutional:

> **(c) Instructions on an [sic] aggravating circumstances which failed to narrow the class of persons eligible for the death penalty and to provide meaningful detailed guidance to the jury, including "murder during the course of a felony" aggravating circumstance.**

The state contends this claim is so inadequate that they are unable to determine whether they [sic] claim has been exhausted and this claim should be dismissed under Habeas Rule 2(c). Again, Thompson's counsel has failed to specifically identify the instruction he is challenging and therefore has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. However, this Court has reviewed the three specific aggravating circumstances instruction that the state trial court gave, and no instruction was given that included the language quoted by petitioner's counsel "murder during the course of a felony." Accordingly, this claim will be **DISMISSED**.

In subpart (d) of Claim 25 petitioner claims the following was an unconstitutional jury instruction:

> **(d) Instructions that shifted the burden of proof to petitioner to show the existence of mitigating circumstances.**

The state contends this claim was correctly rejected by the Tennessee Supreme Court when they determined the only relevant question for constitutional purposes was whether the jury instruction prevented the jury from considering any relevant mitigating circumstances offered by defendant as prohibited under *Mills v. Maryland.* Again, petitioner's counsel failed to specifically identify the instruction he is challenging. Assuming petitioner is claiming the instruction requiring the defendant to establish a mitigating circumstance by a preponderance of the evidence is unconstitutional, this claim is without merit. First, petitioner cites to no Supreme Court case law supporting the existence of a constitutional right prohibiting a state from requiring a petitioner to bear the burden

of demonstrating mitigating circumstances during a capital sentencing proceeding. Second, the United States Supreme Court has held "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona,* 497 U.S. 639, 650 (1990). Accordingly, this claim will be **DISMISSED.**

In Claim 25, subpart (e), Thompson claims the following instruction was unconstitutional:

> **(e) Instructions that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, despite the fact that there was no proof to support this aggravating circumstance.**

The state claims that Thompson has failed to raise this specific issue in the state courts. On direct appeal, when addressing Thompson's contention that there was not sufficient evidence the murder was especial heinous, atrocious, or cruel, the Tennessee Supreme Court found the evidence established an especially cruel murder involving torture or depravity of mind and that the language especially heinous, atrocious, or cruel was not unconstitutionally vague.[11] *Thompson v. State,* 768 S.W.2d

[11] The issue of whether this jury instruction was unconstitutionally vague is not before this Court. The issue before this Court is whether the instruction was unconstitutional because there was no proof to support the aggravating circumstance.

at 252. The Tennessee Supreme Court found the proof showed a particularly senseless killing indicative of depravity of mind.

> The victim was driven some distance into rural Tennessee, stabbed multiple times and left alive, conscious, and alone to die on a winter night. It is highly probable she knew her fate in advance. There is evidence she was crying, and Defendant stated they circled a church off the rural road on the way to the scene of the stabbing. Although the physical evidence does not show the victim was struck by the wheels of the car, Defendant's statement that he drove the car over her body because she was still alive, and presumably to ensure her death, especially indicates a callous disregard for life. Evidence that he felt remorse was sharply contradicted.

Thompson v. State, 768 S.W.2d at 252.

Petitioner has not shown that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence, nor that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (e) will be **DISMISSED**.

Claim 25, subpart (f), claims the following instruction was unconstitutional:

> **(f) Instructions that the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another, despite the fact that there**

was no proof to support this aggravating circumstance.

The state contends the petitioner procedurally defaulted and has failed to show cause and prejudice. The Court finds that petitioner has failed to present this issue to the highest Tennessee Court and has failed to show cause and prejudice. Accordingly, Claim 25, subpart (f), will be **DISMISSED** due to petitioner's procedural default.

Claim 26: TRIAL COURT ERRORS

Petitioner claims that either before trial, during the guilt/innocence phase or penalty phase of his trial, or during post trial or post-conviction proceedings, the Court committed errors that violated petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petitioner claims these constitutional errors include, but are not limited to the alleged errors he lists. To the extent he challenges court errors that he failed to list, the claim will be **DISMISSED** for failure to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING. SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

(a) The Court denied petitioner's pretrial, trial, post trial and post conviction motions, including but not limited to: motions to suppress, motions to change venue, motions to limit media coverage, motions for a judgment of acquittal, etc.

The state contends this claim fails to set forth the facts supporting the claim as required by Rule 2 of the

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to explain how denying these motions violated his constitutional rights or how the trial court's denial of these motions was contrary to or an unreasonable application of established federal law as determine [sic] by the United States Supreme Court. Nor does petitioner claim the trial court made its' decision to deny these motions based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, subpart (a) of Claim 26 will be **DISMISSED.**

Subpart (b) of Claim 26 is similar to and intertwined with Claims 20 and 21:

(b) The Court failed to conduct a meaningful competency hearing notwithstanding clear indicia of Petitioner's incompetency at the time of trial. *See* Claims 20 and 21, *supra*.

The state claims petitioner procedurally defaulted on this claim and has failed to show cause and prejudice. Petitioner claims there was "clear indicia" of his incompetency at the time of trial. However, petitioner fails to provide any evidence that was available at the time of trial to prove petitioner's incompetence. Thompson was found to be competent and sane by Dr. Watson and his own expert, Dr. Copple. The behavior Thompson claims he exhibited prior to committing the crime supports Dr. Watson's diagnosis of antisocial behavior. Although petitioner submitted a deposition of his expert for these federal proceedings with a motion, Thompson failed to support his response to the motion for summary judgment with any affidavits, depositions, or anything other than his allegations. However, the Court notes that his expert was not even asked to attempt to determine his competency at

the time of the crime or trial. None of the experts who tested Thompson after he committed this crime found him to be incompetent or insane; and petitioner failed to cite, to anything in the record where any expert has found Thompson to be incompetent or insane at the time of the crime.

Petitioner claims the state court failed to conduct a meaningful competency hearing. After an exhaustive review of the record, this Court does not find that a competency hearing was held nor was a motion filed requesting such hearing. However, petitioner failed to raise this issue with the highest Tennessee court resulting in procedural default. Petitioner has failed to show cause and prejudice for his default. Accordingly, subpart (b) of Claim 26 will be **DISMISSED**.

In subpart (c) of Claim 26, petitioner claims the Tennessee court "kept relevant facts from the jury regarding petitioner's sentence and the law applicable to the penalties[.]" The petitioner lists seven things the court failed to do. The respondent claims the petitioner procedurally defaulted and failed to show cause and prejudice for his default. Although petitioner arguably presented these claims to the Tennessee Supreme Court in his direct appeal, he presented them similarly as he did here without any factual support. The Tennessee Supreme Court found that Thompson listed a number of issues they were unable to address because they were presented without argument. This Court finds that petitioner has procedurally defaulted on Claim 26(c)(i)-(vii) and has failed to show cause and prejudice for his default.

Additionally, regarding Claim 26(c)(vii): "Effect of a non-unanimous verdict as to sentence," the United States

Supreme Court recently held in *Jones v. United States*, 119 S. Ct. 2090, 2098-2100 (1999) that a defendant is not entitled to a jury instruction that the jury's failure to reach a unanimous sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without the possibility or release. Although the sentencing structure for death penalty cases was slightly different in 1985, in that life imprisonment without parole was not one of the possible sentences, the fact that the Eighth Amendment does not require the jury be instructed as to the consequences of their inability to agree renders this issue meritless. Moreover, Thompson has not presented this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, this claim will be **DISMISSED.**

In subpart (d) of Claim 26, petitioner claims the Court allowed the jury to consider the impact of the crime on the victim or the victim's family. The state claims petitioner has never raised this in terms of a constitutional violation in state court. Petitioner does deny his procedural default. (Court File No. 104, p. 31). Accordingly, this issue will be **DISMISSED** on the grounds of procedural default.

In subpart (e) of Claim 26, petitioner alleges the court allowed the jury to consider non-statutory aggravating circumstances and failed to grant a motion restricting the state to the specific aggravating circumstances filed prior to trial. "As a result, non-probative and highly prejudicial information was admitted against the defendant concerning his military records and post-crime correspondence which constituted hearsay but did not fit into any recognized hearsay exception. Further, this information was used in the cross-examination of character witnesses

which did not have any relationship or personal knowledge of the information, for the sole purpose of introducing incompetent, highly prejudicial information to the jury."

The state claims petitioner procedurally defaulted on this claim and failed to show cause and prejudice for his default. Thompson does not deny he failed to present these claims as constitutional issues to the highest state court of Tennessee. Accordingly, subpart (e) of Claim 26 will be **DISMISSED.**

It is claimed by Thompson in Claim 26, subpart (f), that the Tennessee trial court interpreted the statutory aggravating circumstances to allow the introduction of the following improper evidence:

> **(f) i. A videotape created by the State reenacting the alleged trip that the victim was taken on immediately prior to her death, which contained factual inaccuracies, was irrelevant, speculative and highly prejudicial.**
>
> **ii. Testimony by Dr. Glenn Watson, Ph.D., who participated in the Defendant's competency evaluation which was held without Defendant having been advised of his constitutional rights and without counsel having been notified that any information revealed in the competency evaluation could be used against the Defendant at trial.**

The state contends petitioner filed to raise Claim 26, subpart (f) as a constitutional issue in the highest state

court. Thompson claims he raised part (i) of subpart (f) on direct appeal and in his state post-conviction proceedings. Petitioner failed to raise subpart (f) of Claim 26 as a constitutional issue in state court resulting in procedural default for which he fails to offer any cause and prejudice. Furthermore, for the sake of argument, even if petitioner raised subpart (f)(i) as a constitutional issue there is no showing that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart (f) of Claim 26 will be **DISMISSED.**

Claim 26, subpart (g) challenges certain rulings that were made during petitioner's state court post-conviction proceedings. The state contends subpart (g) fails to state a claim for habeas corpus relief because it relates to post-conviction matters.

Thompson is complaining about state post-conviction proceedings. Thompson claims the State of Tennessee denied him expert and investigative funding at post-conviction necessary to present his claims of constitutional error. 28 U.S.C. § 2254(a) states that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Section 2254 gives federal courts the jurisdiction to determine the constitutionality of a state criminal conviction, but not the authority to review state post-conviction proceedings. *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir.), *cert. denied,* 495 U.S. 936 (1990);

Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), *cert. denied*, 469 U.S. 823 (1984).

As the Court has previously stated, the writ of habeas corpus is not the proper means by which a prisoner should challenge errors or deficiencies in state post-conviction proceedings because these claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration. *Kirby v. Dutton,* 794 F.2d 245, 247 (6th Cir. 1986). "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellants claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself ... Infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief." *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984).

The Constitution does not require the states to provide a means of post-conviction review therefore, an infirmity in a state post-conviction proceeding does not raise a constitutional issue and is not cognizable in a federal habeas petition. *Tokar v. Bowersox,* 1 F. Supp. 2d at 1015; *Gee v. Groose,* 110 F.3d at 1351-52; *Jolly v. Gammon,* 28 F.3d at 54; *Williams-Bey v. Trickey*, 984 F.2d at 317. Accordingly, subpart (g) of Claim 26 will be **DISMISSED** for failure to state a claim for habeas corpus relief.

Thompson claims in subpart (h) of Claim 26 that the trial court "refused to admit, or even receive an offer of proof as to relevant testimony in the penalty phase, specifically, the testimony of Dr. David Wheaton, and refused to admit relevant psychological testimony by Dr. Copple[.]" (Court File No. 17, p. 30, Claim 26 (h)). The

state contends this claim was raised on direct appeal as a state evidentiary issue, not a federal constitutional violation, resulting in procedural default for which petitioner offers no showing of cause and prejudice.

First, Thompson claims the trial court refused to receive an offer of proof by Dr. David Wheaton. The Court finds this claim is untrue because in Addendum II, pages 99 through 122, David K. Wheaton testified outside of the presence of the jury. The state trial court and the Tennessee Supreme Court found that the evidence offered by Dr. Wheaton had no probative value on the circumstances of this crime or the character of this defendant, and therefore it was properly excluded.

Petitioner has not shown that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, Claim 26, subpart (h), will be **DISMISSED**.

Second, Thompson claims the trial court refused to admit relevant psychological testimony of Dr. Copple. Dr. Copple testified during Thompson's penalty hearing. Thompson has failed to specify the relevant psychological testimony Dr. Copple was prohibited from giving. Thompson's counsel has failed to specifically identify the excluded testimony or to cite the Court to the record where the trial court ruled Dr. Copple could not testify, Therefore, he has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254

CASES IN THE UNITED STATES DISTRICT COURTS. Additionally, the Court does not find that Thompson raised this issue with the highest Tennessee court, resulting in procedural default. Accordingly, this claim will be **DISMISSED.**

In subpart (i) of Claim 26, Thompson claims the state court improperly refused to suppress his confession, which was taken in violation of his federal constitutional rights. The state contends this claim is too vague and improperly pled. However, the state agrees the issue regarding the suppression was challenged on direct appeal.

The Tennessee Supreme Court found the trial court's finding was supported by the evidence. The evidence showed the defendant clearly initiated the interview an hour and a half later, and he understood his right to counsel and his right to remain silent and he voluntarily relinquished them. Petitioner has not shown that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, this subpart (i) of claim 26 will be **DISMISSED.**

Petitioner claims in subpart (j) of Claim 26 that the state court failed to send the jury instructions from the guilt phase into the jury room during penalty deliberations. The state contends that petitioner has failed to raise this issue to the highest state court resulting in procedural default for which he offers no proof of cause and prejudice. Thompson claims he raised this issue in his amended petition for post-conviction relief.

The Tennessee Supreme Court addressed this issue on Thompson's direct appeal and found that in absence of a special request, the trial court does not need to repeat the original charge or submit it in writing to the jury so long as the jury is adequately instructed on the issues presented for their determination in the sentencing hearing. Petitioner does not contend, nor does this Court find, that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (j) of Claim 26 will be **DISMISSED**.

Claim 27: TRIAL COURT ERRORS IN VOIR DIRE

Thompson claims the trial court committed errors during voir dire which violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner lists six claims without providing any factual support or cites to the record. Petitioner fails to specify which jurors were improperly excluded and which jurors were improperly not excluded. The record in this case is voluminous and the jury selection alone consists of more than one notebook. Although this Court has spent a substantial number of hours reading the record and attempting to decipher petitioner's factually unsupported claims, it is unable to determine exactly what petitioner's claims are in Claim 27. The state claims petitioner has failed to plead these claims with sufficient specificity to determine what the claims are and which jurors he is referring to in this claim. During oral argument on the state's motion for summary judgment Thompson's attorney informed the Court that it was his intent to raise the issues which were presented to

the state courts. Counsel for petitioner stated "[t]hese claims basically were meant to mirror the claims that had been presented in state court." (Motion Hearing Transcript, pp. 115-116).

Thompson has the burden of showing that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Thompson has failed to cite any federal law or even make an allegation that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court.

On direct appeal the Tennessee Supreme Court found that petitioner's motion to quash the indictment on grounds the grand jury was not impaneled, and its foreman appointed in conformity with TENN. CODE ANN. § 16-2-510 was properly denied. Thompson presented this issue to the Tennessee Supreme Court as a violation of state law and not as a violation of his Constitutional rights. Therefore, this issue is "not cognizable in a federal habeas corpus proceeding." *Spalla v. Foltz,* 788 F.2d 400, 405 (6th Cir. 1986), *cert. denied*, 479 U.S. 935 (1986). *See also Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions[.]"); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law[.]"); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A

federal court may not issue the writ on the basis of a perceived error of state law."); *Sinistaj v. Burt,* 66 F.3d 804, 807 (6th Cir. 1995) ("Errors of state law alone cannot form the basis of relief under federal habeas corpus."); *Houston v. Dutton,* 50 F.3d 381, 385 (6th Cir.), *cert denied,* 516 U.S. 905 (1995) ("When and how state law applies to a particular case is a matter on which the state supreme court has the last word. No federal issues are implicated and no federal questions [sic] is presented in determining whether a change in state law is to be applied retroactively.") (citation omitted). To the extent petitioner seeks to present this claim as a federal constitutional issue, he is procedurally barred from doing so. Accordingly, this claim will be **DISMISSED.**

Thompson also, challenged the composition of the jury on the grounds it did not reflect a fair cross-section of the community as guaranteed by the Sixth Amendment. The Tennessee Supreme Court resolved the issue after reviewing the proof and found that the representation was neither unfair or unreasonable.

> Defendant also challenged the composition of the jury on the grounds it did not reflect a fair cross-section of the community, as guaranteed by sixth amendment. He particularly asserts that black people, women, young people, persons not registered to vote, and an unnamed religious group were underrepresented. To establish a prima facie violation, it must be shown 1) that the allegedly excluded group is a distinctive group in the community; 2) that its representation on the venire is not fair and reasonable in relation to its numbers in the community; and 3) that the underrepresentation resulted from systematic

exclusion. *Duren v. Mississippi*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

Of the allegedly excluded groups only black persons and women meet the first criterion. Although it is possible as a matter of proof to show that others are cognizable groups in a community, it has not been done in this record. *Cf. State v. Nelson*, 603 S.W.2d 158 (Tenn. Cr. App. 1980).

With respect to the second criterion, the, defendant, who was black, has shown the Coffee County population is 96% white and 3.4% black; it is 48.8% male and 51.2% female. The venire of three hundred and ten included six black persons (1.9%); 57% were male and 43% were female. Assuming these percentages relate to the population qualified to serve as jurors, we do not find the representation either unfair or unreasonable. We are cited to no authority that the disparities shown are legally significant, and the record contains no expert analysis that they are statistically significant. Numerical evidence about the group actually served by the sheriff, those answering questionnaires, and those finally selected to serve at this trial are not relevant. In addition, the use of a voter registration list is not a "political test," and there are no data in this record to show that it is an inadequate or discriminatory source of names of potential jurors. *See State v. Caruthers*, 676 S.W.2d 935 (Term. 1984).

State v. Thompson, 768 S.W.2d 239, 245-246 (Tent. 1989).

The Equal Protection Clause likewise prohibits discrimination in the selection of grand jurors. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). A prima facie case is established if a party shows that: 1) the group excluded is a

recognizable, distinct class capable of being singled out for different treatment under the laws; 2) the grand jury selection process is susceptible to abuse or is not racially neutral; and 3) the degree of underrepresentation has occurred over a significant period of time, thus eliminating the chance of having randomly selected a skewed proportion of the population for that party's trial. *Castaneda*, 430 U.S. at 494; *accord Jefferson v. Morgan*, 962 F.2d 1185, 1188-89 (6th Cir.), *cert. denied*, 506 U.S. 905 (1992).

The trial court conducted a hearing on petitioner's motion to quash the jury panel. (Addendum 1 C, pp. 2-84). Mr. A.C. Willis, one of the jury commissioners for Coffee County testified, that the Circuit Court Clerk obtains the voter registration list from the Registrar of Voters. Mr. Willis testified he had the 1st, 7th and 8th Districts of Coffee County and the other districts were divided between the other two Commissioners. Mr. Willis went through the voter registration list every two years and randomly picked out whatever number of people the Judge directed him to pick. He would draw out a name, unless he knew the person had moved, died, or was disabled, and put the name in the jury box. Then a child under the age of ten is brought and selects the names out of the box for a jury venire for a term of court. The form he filled out whenever he drew a jury venire included a space to mark if someone was disabled, moved, or had died. (Addendum 1 C, pp. 16-19).

Petitioner failed to establish that the alleged under-representation of blacks in the jury pool was the result of systematic exclusion. Petitioner does not point to anything in the selection process which makes it obvious that the alleged under-representation of African-Americans was due to the system itself. Thompson's jury panel was

selected by the use of the voter registration list and the voter registration list has been expressly sanctioned by Congress in 28 U.S.C. 1863(b)(2) and is the preferred source of names for prospective jurors. *See Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). The voter registration lists used to select jurors did not include information regarding the voter's race and therefore, there is no showing the procedures themselves were not racially neutral.

The proof supports the trial court's ruling denying the motion to quash the jury panel and the Tennessee Supreme Court's finding that the representation was neither unfair or unreasonable. The petitioner has not alleged, nor does the Court find, that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unseasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (d) of Claim 27 will be **DISMISSED.**

As to the remainder of Claim 27, to the extent the issues were presented to the state courts, Thompson has failed to cite any federal law or even make an allegation that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Petitioner has failed to meet his burden and accordingly, Claim 27 will be **DISMISSED.**

Claim 28. INSUFFICIENCY OF THE EVIDENCE SUPPORTING FIRST DEGREE MURDER CONVICTION

Thompson claims that the evidence introduced at petitioner's trial on guilt or innocence, when viewed in the light most favorable to the prosecution, was insufficient to allow a rational trier of fact finder petitioner guilty of first degree murder beyond a reasonable doubt. Thompson claims his conviction of first degree murder and sentence of death violate the Eighth and Fourteenth Amendments to the United States Constitution. The state contends petitioner procedurally defaulted on this issue because he never challenged the sufficiency of the evidence of the guilt phase.

Thompson has not presented this issue to the highest Tennessee state court. He has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, this claim will be **DISMISSED.**

Claim 29: INSUFFICIENT EVIDENCE SUPPORTING HEINOUSNESS AND AVOID ARREST AGGRAVATING CIRCUMSTANCES

Petitioner claims the evidence introduced during the penalty phase of petitioner's trial, when viewed in the light most favorable to the prosecution, was insufficient to allow a rational trier of fact to find the "especially heinous, atrocious or cruel" and/or the "murder committed for the purposes of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another" aggravating factors. The state contends the state court's decision did not involve an unreasonable determination of

the facts in light of the state court evidence nor, was the state court's decision contrary to or involve an unreasonable application of established federal law as determined by the United States Supreme Court.

The Tennessee Supreme Court addressed this issue on Thompson's direct appeal:

> [33] In several issues Defendant questions the sufficiency of the evidence to support the jury's findings that the murder was committed to prevent the lawful apprehension of Defendant and his companion, T.C.A. § 39-2-203(i)(6), and that the murder was especially heinous, atrocious, and cruel, T.C.A. § 39-2-203(i)(5). There can be no reasonable doubt that the surviving victim could have identified the twosome and raised an alarm, after the theft of her car, and there is nothing in Defendant's statement, the physical evidence, or any other circumstances to suggest another purpose for the Killing. *See State v. Coe,* 655 S.W.2d 903, 913 (Tenn. 1983). The record is sufficient to establish this aggravating circumstance.
>
> [34] The proof also establishes an especially cruel murder involving torture or depravity of mind. It shows a particularly senseless killing indicative of depravity of mind. The victim was driven some distance into rural Tennessee, stabbed multiple times and left alive, conscious, and alone to die on a winter night. It is highly probable she knew her fate in advance. There is evidence she was crying, and Defendant stated they circled a church off the rural road on the way to the scene of the stabbing. Although the physical evidence does not show the victim was struck by the wheels of the car, Defendant's statement that he drove the car over her body because she was still alive, and

> presumably to ensure her death, especially indicated a callous disregard for life. Evidence that he felt remorse was sharply contradicted.

State at *Thompson*, 768 S.W.2d 239, 252 (Tenn. 1989).

Petitioner has failed to establish that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Petitioner has failed to meet his burden and accordingly, Claim 29 will be **DISMISSED**.

Claim 30: ARBITRARY IMPOSITION OF THE DEATH PENALTY AND INSUFFICIENT PROPORTIONALITY REVIEW

Petitioner claims "[t]he state violated [his] rights under the Fourteenth Amendment to the United States Constitution because it imposed his sentence of death without following state procedures for narrowing the class of persons eligible for death afforded other similarly situated persons convicted of first degree murder in the State of Tennessee." The state contends the petitioner insufficiently pled this claim. During the oral argument on the state's motion for summary judgment, petitioner's counsel stated probably more cumulative than vague," (Motion Hearing Transcript, p. 119).

Petitioner fails to state what state procedures were not followed. Therefore, he has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Moreover, the Court does not find that Thompson presented this issue to the highest Tennessee

state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, this claim will be **DISMISSED.**

Claim 31: TENNESSEE'S UNCONSTITUTIONAL DEATH PENALTY STATUTE

Thompson claims in essence, that the Tennessee Death Penalty Statute is unconstitutional. The state contends that subpart (a) was presented to the Tennessee Supreme Court and decided on the merits. As to subparts (b) through (n), the State contends petitioner never specifically presented those issues to the Tennessee Supreme Court. Counsel for petitioner argued that under the futility doctrine it would be futile for him to have presented these challenges to the state court and petitioner contends Claim 31 should be subject to § 2254(d) review. The issues that were not presented to the Tennessee Supreme Court will be **DISMISSED** under grounds of procedural default.

On direct appeal, the Tennessee Supreme Court found that the Tennessee capital sentencing procedure is not unconstitutional. The Tennessee Supreme Court found that the state is properly permitted final argument and that a jury qualified on capital sentencing issues is not incompetent to determine the guilt or innocence of the accused. The Tennessee Supreme Court found that TENN. CODE ANN. § 39-2-203 satisfied the constraints of the eighth amendment. The Tennessee Supreme Court has previously held that Tennessee's death penalty statutes are constitutional. *See State v. Burns*, 1997 WL 418492, at *22 (Tenn. Crim. App. 1997), *aff'd*, 979 S.W.2d 276 (Tenn. 1998), *cert. denied*, 119 S. Ct. 2402 (1999); *State v. Smith*,

893 S.W.2d 908 (Tenn. 1994), *cert. denied*, 516 U.S. 892 (1995); *State v. Brimmer*, 876 S.W.2d 75 (Tenn. 1994), *cert. denied*, 513 U.S. 1020 (1994); *State v. Cazes*, 875 S.W.2d 253 (Tenn. 1994), *cert. denied*, 513 U.S. 1086 (1995); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993), *cert. denied*, 510 U.S. 996 (1993); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990), *cert. denied*, 498 U.S. 1074 (1991); *State v. Teel*, 793 S.W.2d 236 (Tenn. 1990), *cert. denied*, 498 U.S. 1007 (1990); *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990).

Thompson has failed to establish that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Petitioner has failed to meet his burden and accordingly, Claim 31 will be **DISMISSED.**

Claim 32 INADEQUATE STATE APPELLATE REVIEW

Petitioner claims the statutory provisions and actual practices that govern appellate review of death sentences in Tennessee and that were utilized in reviewing his sentence of death on appeal violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In essence, petitioner is claiming the state review process is deficient. The state contends petitioner procedurally defaulted on these claims.

Thompson fails to specify how the state appellate procedures are deficient. Petitioner has made speculative conclusions without setting forth facts supporting the

claims. Therefore, Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Moreover, Thompson has not presented this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 32 will be **DISMISSED.**

Claim 33: GRUESOME, IRRELEVANT, AND UNDULY PREJUDICIAL PHOTOGRAPHIC EVIDENCE

Petitioner claims his constitutional rights were violated when the jury was permitted to view prejudicial photographs and hear testimony regarding the "expression" on the victim's face after the murder. The state claims the jury was not permitted to see photos of the victim's face or testimony regarding her expression. Furthermore, the state claims Thompson procedurally defaulted on this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his default.

Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner does not identify the specific photographs the jury viewed which allegedly were prejudicial, nor does he cite to the record regarding the testimony he alleges was presented. Moreover, petitioner's counsel conceded this issue was not raised on his appeal from the denial of his state post-conviction petition, although he argued the default should be excused due to state post-conviction counsel's ineffective assistance. Thompson has

not presented this issue to the highest Tennessee state court. He has thus procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 33 will be **DISMISSED.**

Claim 34: NO COMPELLING STATE INTEREST IN THE DEATH PENALTY

Petitioner claims the state violated his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it has failed to demonstrate that, in light of petitioner's fundamental right to life, the death penalty is necessary to promote any compelling state interest and is the least restrictive means of achieving any such interest.

The state contends petitioner procedurally defaulted on this claim. Thompson has not presented this issue to the highest Tennessee state court. He has thus procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 34 will be **DISMISSED.**

Claim 35: JUDICIAL ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

Petitioner claims the state has violated his Fifth Sixth, Eighth, and Fourteenth Amendment rights because electrocution constitutes cruel and unusual punishment. The state contends petitioner has procedurally defaulted on this issue and failed to sufficiently plead this claim. Petitioner's counsel argued that the evidence which shows that its cruel and unusual has only been available since

the statute of limitations has expired for him to seek relief in state court. Thompson does not cite to any cases or facts to support his claim that death by electrocution constitutes cruel and unusual punishment.

The Court finds this argument to be frivolous and fails to show cause and prejudice for petitioner's procedural default. Petitioner has known of the possibility of execution for over ten years, The legal basis of such a challenge has been apparent for many years. *See Glass v. Louisiana*, 471 U.S. 1080 (1985) (Justice Brennan and Justice Marshall dissented from the denial of certiorari because in their opinion there was considerable evidence which raised a substantial question whether electrocution violates the Eighth Amendment.). Furthermore, this claim is frivolous as a matter of law. *McQueen v. Patton,* 118 F.3d 460, 464 (6th Cir. 1997) (holding that "[e]lectrocution has never been found to be cruel and unusual punishment by any American court.").

Thompson did not present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. This Court cannot consider Thompson's claim that death by electrocution[12] constitutes cruel and unusual punishment. Accordingly, Claim 35 will be **DISMISSED.**

[12] TENN. CODE ANN. § 40-23-114 (1998) changed the method of execution from electrocution to lethal injection for those persons sentenced to death after January 1, 1999, and provides that persons sentenced to death prior to January 1, 1999, may choose to be executed by lethal injection by signing a written waiver.

Claim 36: TENNESSEE'S UNCONSTITUTIONAL DEATH PENALTY STANDARD

Petitioner claims the Tennessee Death Penalty is based upon an unconstitutional standard. The state claims petitioner procedurally defaulted on this claim.

Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner does not identify the standard, nor does he explain how the standard is unconstitutional. Moreover, petitioner's counsel argued this claim is, in fact, cumulative in that . . . it's a general statement of errors that are described elsewhere in the petitioner [sic]." (Motion Hearing, p. 130). Additionally, Thompson failed to present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 36 will be **DISMISSED.**

Claim 37: COMPETENCY TO BE EXECUTED

Petitioner claimed he could not be executed due to his incompetency. However, during oral argument on the state's motion for summary judgment counsel conceded that this issue is not ripe for adjudication and the state agreed. At this time, an imminent execution date has not been scheduled.

Once an execution date is imminent, the state courts must first be given the opportunity to consider this claim. *See Stewart v. Martinez-Villareal,* 118 S. Ct. 1618 (1998); *Franklin v. Francis*, 168 F.3d 261, 262 (6th Cir. 1999); *Van*

Tran v. State, 6 S.W.2d 257 (1999).[13] Accordingly, Claim 37 will be **DISMISSED WITHOUT PREJUDICE.**

Claim 38: ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Petitioner claims his sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because the death penalty in Tennessee is imposed in an arbitrary, capricious and irrational manner. The state claims petitioner procedurally defaulted on this claim. During oral argument, petitioner's counsel agreed "it's cumulative and that the issues raised in Claim 38 are addressed elsewhere."

Thompson did not present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 38 will be **DISMISSED.**

[13] In this case the Tennessee Supreme Court clarified the procedure by which a prisoner who has been sentenced to death may raise the issue of present mental competency to be executed. The issue of competency to be executed is generally ripe for determination only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence and the Tennessee Supreme Court has set an execution date upon motion of the State Attorney General. The prisoner should raise the issue of competency to be executed in the first instance in the Tennessee Supreme Court when filing a written response to the motion of the State Attorney General to set an execution date.

Claim 39: DEATH PENALTY NOT JUSTIFIED

Thompson claims Tennessee's death penalty lacks any constitutional, moral or penological justification in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The state contends petitioner procedurally defaulted on this claim. Petitioner's counsel informed the Court it was cumulative. (Motion Hearing Transcript, p. 135).

Thompson failed to present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 39 will, be **DISMISSED.**

Claim 40: NON-STATUTORY AGGRAVATORS

Petitioner claims the jury considered non-statutory aggravating circumstances such as petitioner's future dangerousness, his lack of love, compassion, remorse, empathy and sympathy; victim impact testimony; victim characteristics; and petitioner's failure to testify. The state contends petitioner procedurally defaulted on these claims because he has never raised these claims in the state court in the terms that he raises before this Court.

In essence, Thompson is complaining about certain testimony that was introduced in rebuttal to petitioner's proof of his good character during the penalty phase of his trial. Petitioner's counsel agreed there was not any evidence introduced regarding petitioner's failure to testify. (Motion Hearing Transcript, p. 137.) To the extent this claim is subject to § 2254 review, the petitioner does not

show that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence are that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. To the extent petitioner failed to raise these claims in the highest state court, the Court finds he has procedurally defaulted and failed to show cause and prejudice to excuse his default. Accordingly, Claim 40 will be **DISMISSED.**

Claim 41: BRADY CLAIM

Petitioner claims the prosecution withheld exculpatory evidence, including evidence demonstrating that petitioner was not competent at the time of trial and/or at the time of his post-conviction proceedings. Thompson claims the prosecution knowingly presented false evidence both during and prior to his capital trial and sentencing, Specifically, petitioner claims the prosecution falsely presented evidence that he was competent at the time of trial and/or at the time of the offense and/or at the time of his post-conviction proceedings. Thompson further claims "[t]he evidence was highly exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted Thompson and would not have convicted petitioner and would not have sentenced the petitioner to death.

The state contends this claim is barred by petitioner's procedural default. Furthermore, they contend petitioner fails to state a *Brady* claim because there is no claim that

exculpatory evidence of the petitioner's guilt or innocence was withheld.

Thompson's own expert testified during his sentencing hearing that he was competent. The Court has been unable to find any expert testimony anywhere in the record that petitioner was incompetent at the time he committed the crime or during his trial, Petitioner alleges the state prosecutor engaged in false or misleading questioning and use of reports to argue that petitioner was competent and not mentally ill. "The prosecutor misled Petitioner's judge and jury despite having evidence to the contrary, and without revealing such evidence, there by committing gross misconduct" The petitioner has not event [sic] alluded to what the "evidence to the contrary" was that the prosecution allegedly concealed from the judge and jury.

Petitioner does not specifically identify the exculpatory evidence which was withheld by the prosecution that demonstrated he was not competent at the time of trial. Thompson further fails to identify the false evidence the prosecution knowingly presented during and prior to his capital trial and sentencing. Petitioner has made some very serious and disparaging allegations but has failed to provide any factual support whatsoever. The Court cautions petitioner and his counsel that these allegations are made under oath.

Petitioner's medical record consists of numerous indications that he has attempted to fake mental illness. His medical records also show that he has taken medication for alleged mental illness. Petitioner has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. There are absolutely no

facts presented to show the prosecution withheld exculpatory evidence during petitioners jury trial. Thompson's mental condition while incarcerated is not relevant to this claim nor this proceeding since a habeas corpus proceeding challenges the constitutionality of conviction and sentence. The only issue where petitioner's present mental condition would be important, would be the issue regarding his competency to be executed which is not before this Court. Moreover, the Court finds that petitioner has procedurally defaulted and failed to show cause and prejudice to excuse his default. Accordingly, Claim 41 will be **DISMISSED.**

Claim 42: FUNDAMENTAL DENIAL OF DUE PROCESS

Thompson claims that all of the aforementioned United States Constitutional errors, when considered in combination with each other, constitute a fundamental denial of due process of law such that the petitioner is entitled to a new trial on guilt and punishment in this cause.

The state contends the petitioner has procedurally defaulted on this claim. Petitioner's counsel stated it was cumulative. The Court finds this issue is procedurally barred and accordingly, will be **DISMISSED.**

V. Conclusion

The respondent's motion for summary judgment will be **GRANTED** as to all claims. Thompson is not entitled to an evidentiary hearing, and his § 2254 petition will be **DISMISSED.**

An order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STALES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,	§	
Petitioner-Appellant	§	
	§	
v.	§	Case No. 00-5516
RICKY BELL, Warden,	§	
	§	
Respondent-Appellee	§	

MOTION TO HOLD APPEAL IN ABEYANCE PENDING APPELLANT'S CONTEMPORANEOUS 60(b) MOTION IN THE DISTRICT COURT

COMES NOW Petitioner-Appellant, Gregory Thompson, through undersigned counsel, and respectfully requests that the Court hold his appeal in abeyance pending the district court's disposition of his Fed.R.Civ.Pro. 60(b) motion, which is contemporaneously filed with this motion. In support hereof, Mr. Thompson would show as follows:

I. The Propriety of the Instant Motion

This Court is empowered to hold an appeal in abeyance pending resolution of a matter currently before another court. *See e.g. Eubanks v. Wilkinson*, 1989 WL 147107, slip op., p. 1 (6th Cir. 1991) (unpublished) (Attachment A).

II. The Propriety of Mr. Thompson's 60(b) Motion

Contemporaneously with this motion Mr. Thompson has filed a motion in the district court under Fed.R.Civ.Pro. 60(b), asking the district court for leave to supplement the record with Respondent's deposition of Dr. Faye Sultan, who examined Mr. Thompson and viewed his medical records, and Dr. Sultan's report dated July 22, 1999. (Attachment B). As regards Dr. Sultan's opinion of Mr. Thompson's mental status, the district court record does contain a summary of her conclusions in an expert disclosures pleading (R. 19) and an affidavit detailing Dr. Sultan's opinion regarding Mr. Thompson's mental health status in February 1999 (R. 34).

Mr. Thompson's Rule 60(b) motion is timely despite its filing during the pendency of the appeal. *See e.g. First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976); *Flynt v. Brownfield*, 726 F.Supp. 1106 (S.D.Ohio 1989).

III. The Reason for these Motions

In his Brief, Respondent has argued that Mr. Thompson did not present probative evidence of Mr. Thompson's mental health status at the time of the offense. Although the record does not presently contain Dr. Sultan's deposition and report, the record reflects the sworn testimony of Drs. Gillian Blair and Barry Crown on this issue. (R. 112; Memorandum of Law in Support of Petitioner's Application for Extraordinary Appeal of the Trial Court's Order Dated May 29, 1991, Denying Funds for Expert Assistance, Exhibit M, Affidavit of Dr. Blair, p. 2-4f; Apx. ___), (R. 5, Post-Conviction Transcript, Testimony of Dr. Blair, p. 199-259) and (R. 119; Deposition Testimony of Dr.

Crown, p. 4, 45; Apx. ___), respectively. Based on that testimony, Mr. Thompson believes he made a substantial showing of a genuine issue of material fact sufficient to defeat Respondent's summary judgment motion on this point. Moreover, the substance of Dr. Sultan's deposition and report was in front of the district court albeit not in the form of sworn testimony. (R. 19).

Nevertheless, in the event that the Court would ultimately require a greater showing than Mr. Thompson made in the district court via the testimony of Drs. Blair, Crown, and Sultan, Mr. Thompson seeks to present the transcript of Respondent's deposition of Dr. Sultan and her associated report. The transcript and report are attached to this Motion as Attachments C and D, respectively.

WHEREFORE Mr. Thompson respectfully requests that the Court hold his appeal in abeyance pending the resolution of his Rule 60(b) motion in the district court.

Respectfully submitted,

FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.

/s/ Dana C. Hansen
Dana C. Hansen
Assistant Federal
Community Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel for
Petitioner-Appellant

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing Motion to Hold Appeal in Abeyance Pending Appellant's Contemporaneous 60(b) Motion in District Court has been served upon the appellee by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Jennifer Smith, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Glenn Pruden, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Dated this the 1st day of March, 2001.

/s/ Dana C. Hansen
Dana C. Hansen

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA

GREGORY THOMPSON, Petitioner,	)	
v.	)	**Case No: 4:98-CV-6** (Judge Edgar)
RICKY BELL, Warden, Respondent.	)	

MOTION UNDER FED.R.CIV.PRO. RULE 60(b)

COMES NOW Petitioner, Gregory Thompson, through undersigned counsel, pursuant to Fed.R.Civ.Pro. Rule 60(b) and respectfully requests that the Court relieve Mr. Thompson from the final order entered on February 17, 2000, for the purpose of entering an order to supplement the record with Respondent's deposition of Dr. Faye E. Sultan, PhD. and the accompanying report of Dr. Sultan. In support hereof, Mr. Thompson would show as follows:

I. The Propriety of the Instant Motion.

Fed.R.Civ.Pro. Rule 60(b) provides grounds for the instant motion for reasons of mistake, inadvertence, surprise, or excusable neglect within one year from the final order. The order entered in Mr. Thompson's case granting summary dismissal of his amended petition for writ of habeas corpus was entered on February 17, 2000. Therefore this motion, being filed within one year of the order, is timely. This motion is also timely despite the pendency of Mr. Thompson's appeal of the District Court's

order to the Sixth Circuit Court of Appeals. *See e.g. First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976) (holding that when a case is on appeal "the party seeking to file a Rule 60(b) . . . should [] file[] that motion in the district court."); *Flynt v. Brownfield*, 726 F.Supp. 1106 (S.D.Ohio 1989).

II. Dr. Sultan's Involvement in this Case

Earlier in Mr. Thompson's District Court proceedings, Respondent took the deposition of Dr. Sultan. The district court record presently contains a summary of her conclusions in an expert disclosures pleading (R. 19) and an affidavit detailing her opinion regarding Mr. Thompson's mental health status in February 1999 (R. 34). Having examined Mr. Thompson and viewed his social and medical history, Dr. Sultan executed a report in addition to her testimony at Respondent's deposition. (Attachments A & B).

Although this Court denied Mr. Thompson's mental health related claims partially on procedural grounds, Dr. Sultan's deposition and report are important to the merits of the claims. With regards to the merits of Mr. Thompson's mental health related claims, he maintains that he made a sufficient showing of a genuine issue of material fact to overcome Respondent's summary judgment motion notwithstanding Dr. Sultan's opinions. However, Dr. Sultan's opinions certainly are directly relevant to the mental health related claims and should be considered by the Court. Counsel for Mr. Thompson engaged Dr. Sultan's services for the sole purpose of offering her opinions to support his constitutional claims. The failure of counsel to ensure that Dr. Sultan's opinions were filed in the record is a result of excusable neglect.

III. The Grounds for this Motion under Rule 60(b).

Fed.R.Civ.Pro. Rule 60(b) provides:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §§ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished,

> and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

In support of this motion Mr. Thompson would show that Dr. Sultan's deposition and report are not included in the record of the District Court proceedings because of mistake, inadvertence, surprise, or excusable neglect. District Court counsel for Mr. Thompson, Stephen M. Kissinger, was under the mistaken belief that the evidence was in the record.[1] To the extent that counsel should have nonetheless known that Respondent had not placed Dr. Sultan's deposition and report in the record, counsel's failure to ascertain that fact and file the same himself was the result of excusable neglect. During the time period in question, counsel's office was in a state of turmoil and his caseload was excessively burdensome. As described fully in the attached affidavit of counsel, Stephen M. Kissinger, this state of disorder contributed to counsel's excusably negligent failure to realize that Dr. Sultan's deposition and report were not filed in the record. (Attachment C).

WHEREFORE Mr. Thompson respectfully requests that the Court order the record supplemented with the deposition and report of Dr. Faye E. Sultan, PhD. and that

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[1] Respondent's deposition of Dr. Crown and the accompanying report were placed in the record by Respondent (R. 91). Because Respondent had moved for costs incurred in, *inter alia*, hiring its own mental health expert, Dr. Blau, on the grounds that Dr. Blau's services were unnecessary because Petitioner had no expert opinions to support the mental health related allegations contained in the petition, counsel for Mr. Thompson was under the mistaken belief that Respondent had placed his deposition of Dr. Sultan and the report which Dr. Sultan had supplied to Respondent in the record.

the Court revisit its previous summary denial of Mr. Thompson's petition.

Respectfully submitted,

FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.

/s/ Dana C. Hansen
Dana C. Hansen
Assistant Federal Community
Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979
B.P.R.# 19098
Counsel for Mr. Thompson

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing Motion under Fed.R.Civ.Pro. Rule 60(b) served upon Respondent by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Jennifer Smith, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Glenn Pruden, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Dated this the 1st day of March, 2001.

/s/ Dana C. Hansen
Dana C. Hansen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

GREGORY THOMPSON, *Petitioner*,	)	No. 4:98-cv-006 *Edgar*
v.	)	
RICKY BELL, WARDEN, Riverbend Maximum Security Institution, *Respondent*.	)	

ORDER

(Filed Mar. 7, 2001)

This case is before the court on the motion of Gregory Thompson ("Thompson") to alter or amend judgment pursuant to FED.R.CIV.P. 60(b). [Court File No. 133]. On February 17, 2000, the Court entered a memorandum opinion and order [Court File Nos. 124, 125] granting the respondent's motion for summary judgment, and dismissing Thompson's petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254.

Petitioner requests the Court to relieve him from the final order entered on February 17, 2000, for the purpose of allowing him to supplement the record with respondent's deposition and accompanying record of Dr. Faye E. Sultan, PhD. Petitioner claims the instant motion is filed because of excusable neglect and is timely filed pursuant to Rule 60(b) provision that motions filed due to excusable neglect must be filed within one year from the final order. The Court finds the motion was filed more than one year after entry of final

judgment and as such is time-barred. *See Shugar v. Dallman*, 182 F.3d 918 (unpublished table decision), *available at* 1999 WL 397969. at *1 (6th Cir. June 2, 1999); FED. R. CIV.P. 60(b) and 6.

The Court notes the motion was signed by petitioner's counsel on March 1, 2001, and was filed on March 2, 2001. The motion was filed outside the one year time period. According to the Court's calculation, after reviewing the calendar, this motion was required to be filed no later than February 16, 2001, to be considered timely. *See* Rules 6 and 60(b) of the FEDERAL RULES OF CIVIL PROCEDURE.

Accordingly, petitioner's motion [Court File No. 133] is **DISMISSED** as **TIME-BARRED**.

It is SO ORDERED.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES
DISTRICT JUDGE

Case No: 00-5516

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 21, 2001)

GREGORY THOMPSON

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

Upon consideration of the appellant's motion to hold this appeal in abeyance pending the 60(b) motion filed in the district court.

And further considering the response in opposition thereto, and it appearing the district court has ruled on the motion.

It is ORDERED that the motion be, and it hereby is DENIED.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

No. 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON, Petitioner-Appellant, v. RICKY BELL, WARDEN, Respondent-Appellee.	)	ORDER (Filed Mar. 10, 2003)

BEFORE: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Case No: 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 24, 2003)

GREGORY THOMPSON

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

BEFORE: SUHRHEINRICH, MOORE and CLAY, Circuit Judges

Upon consideration of appellant's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Case No: 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Dec. 12, 2003)

GREGORY THOMPSON

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

BEFORE: SUHRHEINRICH, MOORE and CLAY, Circuit Judges

Upon consideration of appellant's motion to continue stay of mandate,

It is ORDERED that the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court disposes of the case.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V.
GREGORY THOMPSON

No. M1987-00067-SC-DPE-DD

ORDER

(Filed Feb. 25, 2004)

On January 21, 2004, the State filed a Motion to Set Execution Date for Gregory Thompson. The motion stated that Thompson had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court rule 12.4(A). On February 2,2 004, Gregory Thompson filed a Response Opposing Motion to Set Execution Date and Request for a Certificate of Commutation. On February 9, 2004, the State filed a Reply to Thompson's Response.

The Response to the State's Motion alleged that an execution date should not be set because Thompson is severely mentally ill. Thompson also requested that this Court issue a certificate of commutation to the governor under Tenn. Code Ann. § 40-27-106 because Thompson's mental condition constitutes extenuating circumstances warranting commutation of his sentence to imprisonment for life. After careful review of the Response and the Request for commutation and the supporting documentation and the State's Reply, the Court concludes that under the principles announced in *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000), Thompson has presented no extenuating circumstances warranting issuance of a

certificate of commutation. It is therefore ORDERED that the Request for a Certificate of commutation is hereby DENIED.

On February 2, 2004, Thompson also filed a Notice of Incompetency to Be Executed Claim, in which he raised the issue of his present competency to be executed and requested a competency hearing under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Upon consideration of the Notice and supporting exhibits, it appears to the Court that Thompson has raised the issue of his present competency to be executed in accord with the procedures adopted by this Court in *Van Tran v. State*. It is hereby ORDERED that the issue is remanded to the Circuit court of Coffee County, where Thompson was originally tried and sentenced, for an expeditious determination of his present competency, including the initial determination of whether he has met the required threshold showing. These proceedings shall be conducted in accord with the procedures and time limits set forth in *Van Tran v. State*, which provides no more than fifty-five (55) calendar days for the conclusion of the trial court proceedings and the filing of an appeal in this Court.

In further appearing to the Court that a Motion for Appointment of Counsel was filed on January 30, 2004, the Court hereby appoints Michael J. Passino, 323 Union Street, Nashville, Tennessee 37201, as lead counsel to represent Thompson in the competency proceedings and in further proceedings in this Court in relation to the imminent execution. The Court also appoints the Office of the Public Defender for the Fourteenth Judicial District to serve as co-counsel in this matter.

Furthermore, after due consideration, the State's motion to set an execution date is GRANTED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the nineteenth day of August, 2004, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Gregory Thompson shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 8, 2004

GREGORY THOMPSON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Coffee County
No. 20,014 Gerald L. Ewell, Sr., Judge

No. M1987-00067-SC-DPE-DD

(Filed May 12, 2004)

The appellant, death-row inmate Gregory Thompson, challenges the trial court's order denying a hearing on the issue of his competency to be executed. The trial court concluded that Thompson had failed to make a sufficient threshold showing. After carefully considering de novo the petition, the trial court's order, and the entire record in this cause, we conclude that the trial court correctly held that Thompson failed to make a threshold showing sufficient to warrant a hearing on his competence for execution. Accordingly, the judgment of the trial court is affirmed.

Judgment of the Circuit Court Affirmed

FRANK F. DROWOTA, III, C.J., delivered the opinion of the court, in which E. RILEY ANDERSON, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined. ADOLPHO A. BIRCH, JR., filed a separate concurring and dissenting opinion.

Michael J. Passino, Nashville, Tennessee, and B. Campbell Smoot, District Public Defender, Fourteenth Judicial

District, Tullahoma, Tennessee, for the appellant, Gregory Thompson.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General; Jennifer L. Smith, Assistant Attorney General; C. Michael Layne, District Attorney General, Fourteenth Judicial District, for the appellee, State of Tennessee.

OPINION

I. Procedural Background

In 1985, a Coffee County jury convicted the appellant, Gregory Thompson, of the first degree murder of Brenda Lane and imposed a sentence of death for this conviction. On direct appeal, this Court affirmed Thompson's conviction and sentence. *See State v. Thompson,* 768 S.W.2d 239 (Tenn. 1989). The United States Supreme Court denied Thompson's petition for a writ of certiorari. *See Thompson v. Tennessee,* 497 U.S. 1031 (1990).

Thereafter, Thompson sought post-conviction relief in the state courts, but after a hearing, the trial court denied relief. The Court of Criminal Appeals affirmed the trial court's judgment, and this Court denied Thompson's application for permission to appeal. *See Thompson v. State,* 958 S.W.2d 156 (Tenn. Crim. App.) *perm. app. denied* (Tenn. 1997).

In 1998, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. The district court granted summary judgment to the State and dismissed the petition. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *See Thompson v.*

Bell, 315 F.3d 566 (6th Cir. 2003). On December 1, 2003, the United States Supreme Court again denied Thompson's petition for writ of certiorari and thereafter denied Thompson's petition for rehearing. *See Thompson v. Bell,* ___ U.S. ___, 124 S. Ct. 804 (2003), *reh'g denied* ___ U.S. ___, 124 S. Ct. 1162 (2004).

On January 21, 2004, one day after the United States Supreme Court denied rehearing, the State filed a motion requesting that this Court schedule Thompson's execution. In response to the motion, Thompson raised the issue of his present competency to be executed and requested a hearing pursuant to *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999).[1]

On February 25, 2004, this Court set Thompson's execution for August 19, 2004, but also remanded the case to the Coffee County Circuit Court[2] for proceedings in accordance with *Van Tran,* including an initial determination of whether Thompson had made a threshold showing sufficient to warrant an evidentiary hearing on the issue of his present competency to be executed.

On March 1, 2004, Thompson filed a petition in the Circuit Court for Coffee County requesting a competency hearing. Attached to the petition were copies of records showing that, for almost twenty years, Thompson has been treated for mental illnesses. The attached records included

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[1] Characterizing Thompson's mental condition as an extenuating circumstance, the response also urged this Court to issue a certificate of commutation to the Governor under Tennessee Code Annotated section 40-27-106. This Court denied Thompson's request for issuance of a certificate of commutation.

[2] Thompson was initially tried and sentenced in the Coffee County Circuit Court.

reports of mental health professionals opining that Thompson is not presently competent to be executed and affidavits from both Thompson's attorney and investigator in the federal court proceedings. These affidavits describe Thompson's delusional beliefs about his upcoming execution.

The State filed a response to the petition, asserting that Thompson's submissions, even if true, did not create a genuine issue of disputed fact about Thompson's present incompetence for execution and thus did not meet the threshold requirements under *Van Tran* for an evidentiary hearing. On March 8, 2004, the trial court entered an order denying a hearing on the issue and concluding that the expert reports submitted by Thompson demonstrate that he presently is aware both of the fact that he has been sentenced to death for the murder of Brenda Lane and of the fact of his impending execution. Thompson filed an expedited appeal as required by *Van Tran,* 6 S.W.3d at 271-72. After carefully considering the record, we affirm the trial court's judgment dismissing the petition.

II. Threshold Issues

A. Public Defender's Motions to Withdraw

In the order of February 25, 2004, setting Thompson's execution date and remanding the case to the Coffee County Circuit Court, this Court appointed Michael J. Passino as lead counsel and the Office of the Public Defender for the Fourteenth Judicial District as co-counsel for Thompson. On March 1, 2004, B. Campbell Smoot, the District Public Defender for the Fourteenth Judicial District, filed both in this Court and in the trial court a "Motion to Withdraw as Counsel." As grounds for

withdrawal, the motion alleged that the Office's sole investigator, Jimmy Dale Conn, served as a lead investigator with the Coffee County Sheriff's Department during the investigation of Brenda Lane's murder and testified for the prosecution at Thompson's 1985 trial.

On March 8, 2004, the trial court denied Thompson's petition for failure to satisfy the threshold showing, but the trial court did not rule on the Public Defender's motion to withdraw. On March 9, 2004, this Court denied the Public Defender's motion to withdraw, stating:

> In our view, the motion is not well-taken. Mr. Conn's past involvement in Thompson's prosecution and trial does not disqualify the entire Office of the Public Defender for the Fourteenth Judicial District from proceedings to determine Thompson's discrete claim that he currently is not competent to be executed.

In this appeal Thompson argues that the trial court abused its discretion by failing to decide the motion to withdraw before ruling on Thompson's petition. In addition, Thompson asserts that the Public Defender should have been allowed to withdraw because an appearance of impropriety exists based upon the investigator's past employment with the prosecution during Thompson's original murder trial.

The State does not respond to the merits of Thompson's argument that withdrawal is appropriate. However, the State points out that this issue has been resolved by this Court, "notes with some concern" that the Office of the Attorney General has never been served with a copy of the motion, despite being listed on the certificate of service for the motion filed in the trial court, and states that the

Attorney General's Office was unaware of the basis of the motion until entry of this Court's order of March 9, 2004.

In our view, the trial court did not err in ruling upon the petition before deciding the motion to withdraw. Thompson provides no legal authority supporting his assertion that the trial court's decision constituted an abuse of discretion. Given that this Court appointed the Public Defender's Office, the trial court reasonably may have concluded that this Court should consider and dispose of the motion to withdraw. Furthermore, as the State points out, in light of this Court's order denying the motion to withdraw, Thompson's claim is moot insofar as he suggests that the motion established an appearance of impropriety and that the trial court erred by not granting the motion.

However, our inquiry is not ended. On March 17, 2004, the Public Defender moved this Court to reconsider its order of March 9, 2004, denying his motion to withdraw. This motion asserts that, because one of the three lawyers employed by the Public Defender's Office represented Thompson's co-defendant, Joanne MacNamara, a conflict of interest exists requiring withdrawal of the entire Public Defender's Office. Accordingly, the motion requests that this Court reconsider its March 9 order and allow the Public Defender's Office to withdraw.

We are of the opinion that this motion is not well-taken. The Public Defender's Office has been appointed as co-counsel in a proceeding to determine the discrete issue of Thompson's present competency to be executed. Thompson has completed the standard three-tier appeals process. Issues relating to the validity and correctness of Thompson's conviction and sentence have been litigated in

proceedings that are now final. The Public Defender's motion alleges neither a conflict of interest nor an appearance of impropriety requiring withdrawal. *See State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003) (discussing conflict of interest and appearance of impropriety). Accordingly, the Public Defender's motion to reconsider is without merit and is denied.

B. Trial Judge's Recusal in Prior Case

On March 30, 2004, Thompson filed in this Court a "Motion to Vacate Trial Court Order, or, in the Alternative, Supplemental Brief in Support of Appeal." In this filing, Thompson contends that the order entered by Judge Gerald Ewell, the trial court judge who reviewed and denied Thompson's competency petition, is void because Judge Ewell recused himself from Thompson's post-conviction case. Thompson cites to cases from Tennessee and other jurisdictions holding that a trial judge who recuses himself or herself can take no further action in the case except necessary ministerial acts, such as transferring the case to another judge.[3] Under these authorities,

[3] Thompson relies upon the following authorities to support this proposition: *El Fenix de Puerto Rico v. The M/Y JOHANNY*, 36 F.3d 136, 142 (1st Cir. 1994); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983); *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260-61 (5th Cir. 1983); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956); *Rohrbach v. ATT Nassau Metals Corp.*, 915 F. Supp. 712, 716 & n.5 (M.D. Pa. 1996); *Gubler v. Commission on Judicial Performance*, 688 P.2d 551, 567-68 (Cal. 1984); *Bolt v. Smith*, 594 So. 2d 864, 864 (Fla. Dist. Ct. App. 1992); *State v. Evans*, 371 S.E.2d 432, 433 (Ga. 1988), *overruled on other grounds by State v. Smith*, 485 S.E.2d 491 (Ga. 1997); *Ferguson v. Pony Express Courier Corp.*, 898 S.W.2d 128, 130

(Continued on following page)

Thompson asserts, any other orders of the recused judge are void and of no effect. Relying upon these authorities, Thompson asks this Court to vacate Judge Ewell's order and remand this case and designate another judge to hear the cause. Thompson asks that this Court appoint Judge Frank Clement, Jr., of the Court of Appeals, as a special judge because Judge Clement presided over Thompson's prior conservatorship proceedings.

On April 2, 2004, the State filed a response to Thompson's motion and/or supplemental brief. While the State does not dispute the proposition that a recusal order disables a judge from further adjudicative responsibility in the proceeding in which the order is entered, the State points out that the disqualification does not extend to subsequent independent proceedings unless some disqualifying factor exists in those proceedings as well. Relying upon *Van Tran* and this Court's order denying the Public Defender's motion to withdraw, the State contends that this competency proceeding is an independent action involving a discrete issue, not a continuation of any prior proceedings. *See Van Tran,* 6 S.W.3d at 264 (holding that post-conviction is not the appropriate avenue for litigating the issue of competency to be executed). We agree.

As the State points out, this Court in *Van Tran* instructed that the trial court in which the prisoner's

(Mo. Ct. App. 1995); *State ex rel. Johnson v. Mehan,* 731 S.W.2d 887, 888 (Mo. Ct. App. 1987); *Byrd v. Brown,* 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981); *Pueblo of Laguna v. Cillessen & Son, Inc.,* 682 P.2d 197, 199 (N.M. 1984); *State v. Nossaman,* 666 P.2d 1351, 1355 (Or. Ct. App. 1983), *abrogated on other grounds by Matter of Marriage of Benson,* 919 P.2d 496 (Or. Ct. App. 1996); *McElwee v. McElwee,* 911 S.W.2d 182, 186 (Tex. App. 1995).

original trial occurred is the proper forum for competency proceedings. 6 S.W.3d at 267. Furthermore, this Court later explained that, "[a] competency proceeding is sui generis. . . . " *Coe v. State,* 17 S.W.3d 193, 214 (Tenn. 2000). A competency proceeding is an action independent of the trial and post-conviction proceedings. *Id.* Finally, as the State emphasizes, a claim of ineffective assistance of counsel, the basis for Judge Ewell's recusal in the post-conviction case,[4] does not arise in this competency proceeding. In short, Judge Ewell's recusal in the post-conviction case does not disqualify him from presiding in other separate and independent proceedings involving Thompson, including this competency proceeding. *Cf. State v. Thornton,* 10 S.W.3d 229, 237 (Tenn.Crim.App.1999) (recognizing that a judge is not disqualified from hearing a case because the judge has knowledge of the facts of the case). Thompson's request to vacate the trial court's order and remand for designation of another judge is not well-taken and is denied.

[4] At Thompson's original trial and in the Rule 12 Report, Judge Ewell commended defense counsel's performance. In the post-conviction proceeding, Thompson filed a successful motion to disqualify Judge Ewell, arguing that his earlier remarks showed that he had "prejudged" the issue of ineffective assistance of counsel. There is no indication that Thompson challenged Judge Ewell's qualification in the trial court in the present case; therefore, the issue could be considered waived. *See Thompson v. State,* 958 S.W.2d 156, 172 (Tenn. Crim. App.), *perm. app. denied* (Tenn. 1997) (stating that the right to an impartial judge may be waived by lack of timely objection). Thompson explains his failure to raise the issue earlier by alleging that he had no formal notice that Judge Ewell had been assigned this case until entry of the order he now appeals.

C. Request for Stay – Inter-American Human Rights Commission

On April 2, 2004, Thompson filed a document entitled "Notice of Inter-American Human Rights Commission of the Organization of American States Request of the United States to Take Precautionary Measures to Prevent the State of Tennessee from Carrying out the Execution of Gregory Thompson Presently Scheduled for August 19, 2004 and Request for Stay of Execution." By this document, Thompson requests that this Court issue a stay of his execution based on a petition filed with the Inter-American Commission on Human Rights ("Commission"), asserting that his execution would violate the American Declaration of the Rights and Duties of Man ("Declaration") because of his mental illness and because of alleged "irregularities" in his criminal proceedings.[5] In his motion to this Court, Thompson asserts that the rules of the Commission allow the United States government two months to respond to his petition, and, assuming the United States government responds at the end of its allotted time, a stay is necessary to allow the Commission sufficient time to examine Thompson's case.

As a general rule, international agreements, even those benefitting private parties, do not create rights privately enforceable in domestic courts. *United States v. Emuegbunam*, 268 F.3d 377, 389, 392 (6th Cir. 2001) (holding that the Vienna Convention, and in particular

[5] The State points out that Thompson's petition to the Commission was submitted *ex parte* and that information regarding the petition derives from a letter Ariel Dulitzky directed to attorneys Michael J. Passino and Marjorie Bristol, dated March 31, 2004, noting receipt by the Commission of Thompson's petition.

Article 36, does not create in a detained foreign national a right of consular access). "In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them." *Id.* at 389. There are, of course, exceptions to this rule, but an international agreement can be considered to create judicially-enforceable private rights only where such rights are contemplated in the agreement itself. *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985)). The general rule that a treaty creates no rights privately enforceable in domestic courts clearly applies to Thompson's motion.

In 1951, the United States ratified the Charter of the Organization of American States ("OAS").[6] This treaty authorized creation of the Commission. *See Garza*, 253 F.3d at 924 (citing OAS Charter (Amended) Article 112, 21 U.S.T. 607). The Declaration, under which Thompson invokes the Commission's authority, creates no judicially cognizable rights for individuals. Rather, it is an aspirational document, imposing no enforceable obligations on any member nation of the Organization of American States. *Garza*, 253 F.3d at 923 (stating that the Declaration is an aspirational document that, in itself, creates no directly enforceable rights). The OAS Charter authorized the creation of the Inter-American Commission on Human Rights, which serves as an autonomous consultive organ to the OAS on human rights matters and a convention to determine the structure, competence, and procedure of the Commission. The resulting American Convention on

[6] The treaty was ratified by the United States as amended in 1968. *Garza*, 253 F.3d at 924.

Human Rights ("American Convention") accomplished that purpose and, as well, created an Inter-American Court of Human Rights, whose decisions are potentially binding on member nations. *Garza,* 253 F.3d at 925. While the United States has signed and ratified the OAS Charter, the United States has *not* ratified the American Convention. *Id.; see also Stanford v. Kentucky,* 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting) (noting that Article 4(5) of the American Convention on Human Rights has been signed, but not ratified, by the United States).[7] Consequently, the American Convention does not qualify as a "treaty" of the United States and creates neither obligations binding on the United States government nor rights privately enforceable in domestic courts. *See Garza,* 253 F.3d at 925.

Indeed, the Commission's governing document, the Statute of the Inter-American Commission on Human Rights, provides separate procedures for processing complaints against nations that have ratified the Convention and those, like the United States, that have not ratified the Convention. Under the Commission's governing statute, the Commission's authority as to complaints, such as Thompson's, against non-ratifying nations is limited to making *recommendations* for what it might consider more effective observance of human rights. *Id.* As to nations that have ratified the American Convention, the Commission's powers are extended to include action before the Inter-American Court of Human Rights. Under neither circumstance, however, does the Commission's authority

[7] See http://www.oas.org/main/english/. for a copy of the OAS, an explanation of the powers and duties of the Commission, and a list of nations that have ratified the American Convention.

as to member nations exceed simply making non-binding recommendations in response to complaints of human rights violations. *Id.* The Commission's request for precautionary measures in response to Thompson's petition, then, is simply a "request" which has no binding effect on either the United States government or this Court. *See Garza,* 253 F.3d at 925 (stating that the United States has not obligated itself to be bound by the Commission's decisions); *Roach v. Aiken,* 781 F.2d 379, 380 (4th Cir. 1986) (denying a stay of execution where no treaty obligation would require enforcement of a decision of the Commission); *Jamison v. Collins,* 100 F. Supp. 2d 647, 766 (S.D. Ohio 2000) (same); *see also Buell v. Mitchell,* 274 F.3d 337 (6th Cir. 2001) (stating that the American Declaration of the Rights and Duties of Man is not binding on the courts of the United States). As the Seventh Circuit recognized, "non-binding recommendations to a government on how to conduct its affairs would appear to be addressed to the executive and legislative branches of the government, not to the courts." *Garza,* 253 F.3d at 926. In short, the Commission's decisions are in no way binding on domestic judicial proceedings. Thompson's motion requesting a stay of execution to allow the Commission time to consider his petition therefore is denied. *See Philip R. Workman v. State,* No. M1999-1334-SC-DPE-PD, Order (Tenn. filed Mar. 29, 2001) (denying death-row inmate's request to stay his execution pending resolution of his petition before the Inter-American Commission on Human Rights); *Workman v. Sundquist,* 135 F. Supp. 2d 871, 872 (M.D. Tenn. 2001) (concluding that death-row inmate was not entitled to temporary restraining order staying execution where inmate could not show decision of Inter-American Commission is enforceable in courts of the United States).

III. Competency Petition

Having resolved these threshold issues, we must next consider whether the trial court erred in concluding that Thompson had failed to make a threshold showing sufficient to warrant a hearing on his competency petition. Under Tennessee law, a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it. *Van Tran,* 6 S.W.3d at 266. A prisoner is not entitled to a hearing on the issue of competency unless the prisoner makes a threshold showing that a genuine, disputed issue exists regarding the prisoner's present competency. *Id.* at 268; *see also Coe,* 17 S.W.3d at 211. As this Court explained in *Van Tran,* the rationale underlying the threshold requirement is twofold. First, death penalty litigation engenders the potential for false claims and intentional delay. The issue of incompetency is particularly troublesome because this issue can be repeatedly litigated by the same prisoner until the very moment of execution with the prisoner repeatedly claiming the onset of incompetence sometime after the previous determination to the contrary. *See Van Tran,* 6 S.W.3d at 270 (citing *Ford v. Wainwright,* 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in the result in part, dissenting in part)). Second, the prisoner is presumed to be competent because the prisoner is asserting incompetency "following a trial and sentencing hearing at which his sanity was either conceded or determined by the court." *Van Tran,* 6 S.W.3d at 271 n.15 (quoting *Ford,* 477 U.S. at 426 n.6 (Powell, J., concurring)) (citing *State v. Harris,* 789 P.2d 60, 67 (Wash. 1990); Ariz. Rev. Stat. Ann. § 13-4022(E) (West Supp. 1998); Ohio Rev. Code Ann. § 2949.29(c) (Anderson Supp. 1998)).

Given these compelling rationales, requiring a prisoner to make a substantial threshold showing is both necessary and appropriate. Indeed, as this Court emphasized in *Van Tran*:

> [w]ithout a substantial threshold requirement, the eleventh hour petitions asserting insanity would be encouraged because the death row petitioner would know that the mere filing of a conclusory petition would result in a stay of execution. Placing no initial burden on the petitioner is an invitation to specious insanity claims.

Van Tran, 6 S.W.3d at 269 (quoting *Harris,* 789 P.2d at 69). Thus, the prisoner bears the burden of making a threshold showing that a genuine, disputed issue exists regarding the prisoner's present competency.

> This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached to the prisoner's petition should be from psychiatrists, psychologists, or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Van Tran, 6 S.W.3d at 269 (citations omitted). Proof sufficient to meet this threshold showing must relate to *present* incompetency; therefore, crucial to this showing is evidence from recent mental evaluations or recent observations of the prisoner. *Id.; see also Coe,* 17 S.W.3d at 212. The threshold is thus not satisfied by evidence of the

prisoner's distant past incompetency. *Id.* In addition, unsupported conclusory assertions will be insufficient to satisfy the required threshold showing. *Id.* Allegations that the prisoner is mentally ill are not sufficient to meet the threshold showing requirement. *See Coe,* 17 S.W.3d at 221 (stating that "the existence of a mental disorder does not automatically translate into a finding of incompetency to be executed"). Unless the prisoner submits materials that raise genuine disputed issues about the prisoner's mental capacity to understand or be aware of the fact of the impending execution and the reason for it, the threshold showing has not been met. *Id.* at 220. Furthermore, the prisoner's unusual views about what occurs after the prisoner's execution "are not pertinent to the question of [the prisoner's] competency because they do not impede [the prisoner's] ability to understand the fact of [the prisoner's] impending execution and the reason for it." *Id.* at 222. Indeed, as this Court and other courts have recognized, "what occurs beyond death is not a subject on which any witness can be qualified as an expert, and every person is free to believe as he or she may wish on that subject." *Id.* at 222.

Finally, this Court will review de novo the trial court's determination that Thompson failed to establish a genuine issue regarding his present competency. The trial court's decision at the threshold showing stage generally involves no factual determinations entitled to deferential review. Unlike *Coe,* the trial court in this case did not observe witnesses and make credibility determinations. Indeed, the trial court in this case reviewed affidavits and other written submissions before determining that Thompson had failed to establish a genuine issue as to his present competency to be executed. Therefore, much like the

standard of review applied when reviewing a lower court decision granting summary judgment, the appropriate standard of review in this case is de novo, with no presumption of correctness afforded the trial court's decision. Whether a genuine issue exists is a question of law.[8] *See, e.g., Guy v. Mut. of Omaha Ins. Co.,* 79 S.W.3d 528, 534 (Tenn. 2002) (applying de novo review in the summary judgment context). *Cf. Van Tran,* 6 S.W.3d at 272 (stating that procedural issues are reviewed de novo). Likewise, the appropriate standard of appellate review in this context is de novo with no presumption of correctness afforded the trial court's determination.[9]

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[8] In the summary judgment context, the movant bears the burden of establishing that a trial is not necessary because no genuine issue of disputed material fact exists. Here, the prisoner bears the burden of establishing that a hearing is necessary because genuine issues of disputed fact exist regarding the prisoner's competency.

[9] Our conclusion that de novo review is the appropriate standard should not be viewed as an acceptance of Thompson's assertion that the trial court's order "does not reflect independent judicial judgment." Thompson's claim that the trial court improperly delegated its obligation to make findings of fact and conclusions of law to the State, thereby depriving him of procedural due process and a neutral and independent adjudication, is based largely upon the following statement in the order: "In this case many of the assertions made by the State in response to said petition came to the mind of the undersigned while reading the petition, and the State's response generally enunciates the opinion and findings of this Court." Thompson equates this remark with the disfavored procedure of a trial court having counsel for the prevailing party prepare the court's order or findings of fact and further argues that because the trial court improperly "adopted" the State's response, this Court should review the case de novo and not afford a presumption of correctness to the trial court's findings. In our view, Thompson's claim that the trial court's order "does not reflect independent judicial judgment" is belied by the very statement on which he relies. The fact that, while reading the petition, the trial court reached the same conclusions as the positions advanced by the State and

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Our holding in this regard is a clarification of that portion of *Van Tran* which instructed that, if a trial court determines the prisoner has failed to meet the required threshold showing, "the trial court shall enter an order denying the petition, which shall include written detailed findings of fact and conclusions of law." *Van Tran,* 6 S.W.3d at 269. The trial court need only include detailed findings of fact in the order if the trial court actually makes findings of fact. Where as here the trial court concludes that the prisoner's written submissions fail to meet the threshold showing required for a hearing, findings of fact are not necessary.

Having articulated the governing legal standards, we next must apply those standards to Thompson's petition and supporting documents.

IV. Thompson's Petition and Supporting Documents

To support his claim of incompetence in this case, Thompson attached to his petition eighteen exhibits, consisting of records detailing Thompson's history of mental illness while in custody of the Tennessee Department of Correction for the murder of Brenda Lane; materials regarding the appointment and later termination of a

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ultimately ruled adversely to Thompson provides no basis for a determination of judicial bias or lack of independent judicial judgment. *See, e.g., Alley v. State,* 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994) (stating that a ruling adverse to a party's interest is not sufficient to establish judicial bias). While the order is brief, it is clear that the trial court independently reached its decision and drafted the order. Though we have concluded that de novo review is the appropriate standard in the context of this case, we reject Thompson's charge that the trial court failed to exercise independent judicial judgment. This claim is without merit.

conservator to supervise Thompson's medication; affidavits from Thompson's attorney and investigator in the federal proceedings; and the reports and curricula vitae of three mental health professionals, who have examined Thompson within the last three months and opine that he is incompetent to be executed.

Many of the exhibits, particularly the records relating Thompson's history of mental illness, are stale and thus not relevant to the issue of *present* competency. *See Van Tran,* 6 S.W.3d at 269. Nevertheless, Thompson asserts that these records reflect delusional beliefs about his personal identity ("he is God and in control of the world" and "he is a wealthy songwriter"), about the State's ability to carry out his death sentence ("he believes, despite his death sentence, that he will be released from prison . . . because Big Bird or God is on his side") and/or the likelihood that his execution will occur ("he will be released from prison . . . simply because that is what is going to happen"), and demonstrate that he lacks the mental capacity to be executed. We disagree.

Approximately eight months ago, at the request of Thompson's current counsel, the Davidson County Probate Court terminated a conservatorship for Thompson that had been in place since March 2001. In terminating the conservatorship, then Probate Court Judge Frank G. Clement, Jr., found that Thompson has some insight into his mental illness, that he voluntarily takes his medication, and that he is not in need of the supervision or

assistance of a conservator.[10] Judge Clement stated as follows at the conclusion of the termination hearing:

> [I]n the two plus years that Frank Freemon has been conservator – I'm extremely pleased that he was there, but he's basically been unnecessary, which is pretty compelling in itself. . . . I'm impressed with the fact that, as Mr. Freemon indicated today, they hand him [Thompson] his meds . . . and he takes them voluntarily. With that in mind, I believe the conservator is unnecessary.

Moreover, review of the exhibits that are prison records relating to Thompson's mental health history illustrates that Thompson remains aware that he has been sentenced to death for the murder of Brenda Lane. For example, on September 24, 1998, Thompson was interviewed by a prison psychiatrist. During the interview, Thompson recounted that he had seen a psychiatrist while in the Navy. According to the prison psychiatrist, "Mr. Thompson [said] 'the psychiatrist he saw in the military should have done more tests and *he would not have ended up on death row.*'" (Emphasis added.) According to a prison nurse, Thompson claimed, on January 20, 2001, that an officer at the prison "is actually a woman he is suppose [sic] to have murdered. That she is that person,

[10] Incompetence is not the standard for appointment of a conservator under Tennessee law. In March 2001, Thompson was found to be "disabled" within the meaning of Tennessee Code Annotated section 34-1-101(7) and in need of the protection and assistance of a conservator. A "disabled person" is defined by the conservatorship statute as "any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity." Tenn. Code Ann. § 34-1-101(7) (2001).

right age, right build, right hair 'not many people have black-red hair.' Inmate relates that since she is alive and working here *he could not have murdered her and he should not be on death row for something he didn't do.*" (Emphasis added.) Again, on September 6, 2002, Thompson questioned a prison psychiatrist, "I'd like to know when I'm getting out of here." When the psychiatrist asked, "How long is your sentence Greg?" Thompson answered, "*Death.*" (Emphasis added.) Contrary to Thompson's assertions, therefore, records from the conservatorship proceeding and from the prison do not establish a genuine issue of disputed fact regarding his competency to be executed.

Thompson also submitted the reports of three mental health experts who opined that he presently is not competent to be executed. Although all of these reports indicate that Thompson is suffering from mental illness, described as schizophrenia, chronic undifferentiated type, the reports do not present facts indicating that Thompson is unaware of his impending execution and the reason for it. In fact, as the State points out, parts of these reports support the opposite conclusion, that Thompson presently meets the standard of competency for execution.

Although each of the experts ultimately opines that Thompson is presently incompetent to be executed, these opinions, standing alone with no underlying factual bases, are not sufficient to give rise to a genuine issue regarding Thompson's present competency. Significantly, the reports of all three experts either explicitly, or as part of the factual bases underlying their opinions, illustrate that Thompson presently is aware of the fact of his impending execution for the murder of Brenda Lane.

In a report dated January 28, 2004, Dr. John S. Rabun, a psychiatrist, states that, when questioned about the reason for his incarceration, Thompson "readily admitted that he 'killed Brenda Lane.'" Thompson further discussed his trial in Coffee County with Dr. Rabun, stating that he had been convicted of first-degree murder and, during the "second phase," had been sentenced to "death." Dr. Rabun includes in his report four factors that suggest Thompson is competent to be executed:

> (1) Mr. Thompson told the examiner that executions in Tennessee are by "lethal injection or the electric chair," suggesting that he understands how the death penalty is carried out;
>
> (2) Mr. Thompson told the examiner that he was convicted in 1985 of killing the victim of the instant matter, suggesting that he understands the reason for his death sentence;
>
> (3) Mr. Thompson told the examiner that he received the death penalty during the "second phase" of his trial, suggesting that he understands the penalty he received; and
>
> (4) Although Mr. Thompson did not know anything about the current appeal process in his case, he said that he knew the State of Tennessee was seeking to execute him.

Dr. Rabun's ultimate opinion of incompetence is based upon Thompson's alleged delusional beliefs about: (1) his personal status and identity;[11] (2) the State's ability to

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[11] According to Dr. Rabun's report Thompson believes he: "is actually a 'lieutenant' in the navy"; buried "one million dollars, two gold bars, one Grammy award, and two stock certificates from Quaker State

(Continued on following page)

carry out the death sentence;[12] (3) the likelihood that the sentence will actually be carried out;[13] and, (4) what will happen to him upon execution.[14] This Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution. *Coe,* 17 S.W.3d at 220-22 (declining to overturn the trial court's decision finding Coe competent despite Coe's belief that at his execution he would be in another place in the same body, would visit his ex-wife and child, and would perhaps temporarily be a ball of fire that speaks to people).

Moreover, Dr. Rabun's report, recounting the substance of an interview with Thompson as recently as January 19, 2004, clearly demonstrates Thompson's awareness of the details of the murder of Brenda Lane, the

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and Apple Computers near a church in Georgia"; and "made up the Klingons so that young people would have a strong black person in TV."

[12] According to Dr. Rabun's report, Thompson believes that even though the murder happened within the State of Tennessee, he is "federal property" due to his "officer" status in the Navy, and the State cannot execute him.

[13] According to Dr. Rabun's report, Thompson believes that his military record with the "Secretary of the Navy" as a "lieutenant" will allow for a "mistrial" and that he will be "discharged" and can return to live in Hawaii. Dr. Rabun also commented that Thompson holds "magical, near child-like reasoning about possible avenues of appeal in the present case."

[14] According to Dr. Rabun, Thompson believes he is a Klingon and that his soul will go to Valhalla. Klingons are fictional warrior aliens who appear on the "Star Trek" television series and movies. *See* http://www.startrek.com/startrek/view/library/aliens/article/70638.html (last visited May 10, 2004). The Merriam-Webster Online Dictionary defines Valhalla as "the great hall in Norse mythology where the souls of heroes slain in battle are received." *See* http://www.m-w.com/cgi-bin/dictionary?va=Valhalla (last visited May 10, 2004).

trial and sentencing proceedings resulting in his current death sentence, and further, that he accepts full responsibility for his actions. The report states as follows:

> *Committing Offense:* Mr. Thompson was questioned about the reason for his incarceration. Mr. Thompson readily admitted that he "killed Brenda Lane." He noted that he and a female friend had an "idea" to go to Tennessee. He was then living in Georgia, estimating that he returned to Georgia in 1984. He told the examiner that he and his female friend drove to Tennessee, and he kidnapped "Brenda Lane" who worked at a "Methodist newspaper." He again reported that he "killed Brenda Lane." In other words, he accepted responsibility for his actions. At no point in either interview with the examiner did he try and claim he was innocent or allege that another party committed the offense. Subsequently, he discussed his trial in Coffee County, Tennessee. He indicated that he was convicted of "First Degree Murder" and during the "second phase" was sentenced to "death."

In short, Dr. Rabun's report fails to satisfy the threshold showing for a hearing on competency. Indeed, its detailed description of Thompson's awareness of the murder of Brenda Lane, his sentence of death, and his impending execution, undercuts, rather than supports, his claim of incompetence. *See Coe,* 17 S.W.3d at 221-222 ("The appellant's comments asserting his innocence and contending that the purpose of his execution is to prevent the truth from coming out actually demonstrate that he understands the fact of his impending execution and the reason for it."); *Cf. Schornhorst ex rel. Fleenor v. Anderson,* 77 F. Supp. 2d 944, 955 (S.D. Ind. 1999) (stating that the prisoner considered his execution unfair, but finding that

the prisoner had failed to make a threshold showing of incompetency).

The next report is that of Dr. George W. Woods, Jr., a psychiatrist, who evaluated Thompson on February 17, 2004, for three hours. In a report dated February 27, 2004, Dr. Woods diagnoses Thompson as suffering from schizophrenia, undifferentiated type, and opines that Thompson is "currently incompetent to be executed." Dr. Woods reported that Thompson suffers from bizarre delusions and perceptual disorders such as auditory hallucinations and that Thompson believes he cannot die and will stay alive for two years even if he is executed. Thompson also told Dr. Woods that, once it is acknowledged that he is a lieutenant in the Navy, he will receive a trial before a military tribunal and be exonerated. According to Dr. Woods, Thompson also claims that he has a fortune in gold bullion buried in his hometown in Georgia, denies that he will die from electrocution, and says that he has been electrocuted before and plans to go either to "Gangster's Paradise" or to Hawaii after his death. Dr. Woods concluded that, although not mentally retarded, Thompson's mental state is analogous to that of mental retardation and that the same reasons given by the United States Supreme Court in *Atkins v. Virginia,* 536 U.S. 304 (2002), to explain why execution of the mentally retarded is unconstitutional, apply equally to Thompson. Although Dr. Woods relates Thompson's delusional beliefs, his report fails to address directly the critical inquiry under *Van Tran* – whether Thompson is aware of the fact of his

impending execution and the reason for it.[15] To the contrary, Dr. Woods's report indicates that Thompson is aware of the fact of his impending execution and the reason for it. For example, the report states:

> Mr. Thompson believes that he can not die, and there will be a two year period in which he will stay alive, even if he were *executed.* He also believes *that he will not be executed* since he was a lieutenant in the navy, and once this information is acknowledged, *his current conviction* will be thrown out and he will receive a military tribunal which will exonerate him. Thompson further relates that *the electric chair is his method of choice.*

(Emphasis added.) Again, Thompson's beliefs about what will occur after his death or dissatisfaction with his conviction and sentence do not raise genuine issues regarding his competency for execution unless those beliefs preclude Thompson from being aware of the fact of his impending execution and the reason for it. Dr. Woods's report fails to illustrate that Thompson's beliefs pose such an impediment and therefore fails tc establish a genuine issue under *Van Tran* regarding Thompson's present competency.

The third report was provided by Dr. Faye E. Sultan, a psychologist, who examined Thompson on January 28, 2004. Dr. Sultan stated that "in a non-medicated state, Mr. Thompson is floridly psychotic" and unaware of his surroundings. Dr. Sultan opined that Thompson is not

[15] Dr. Woods's report fails to set forth any definition or guiding authority that indicates his opinion is based upon the appropriate legal standard for competence under Tennessee law.

competent to be executed "in a non-medicated state." Currently, however, as Dr. Sultan acknowledges, Thompson participates in a regular regimen of medications. Dr. Sultan admits that Thompson knows he has been sentenced to death, but she points out that Thompson holds the delusional beliefs that it is impossible for him to be executed or for the execution to occur. Thompson instead talks about leaving prison and returning to Hawaii or to his family.

At best, Dr. Sultan's affidavit establishes that Thompson may become incompetent at some point in the future if he deviates from his current medication regimen, an allegation that has been rejected by this Court on more than one occasion as insufficient to trigger competency proceedings under *Van Tran*. *See Coe,* 17 S.W.3d at 221 n.5 (stating that the issue in a *Van Tran* proceeding is the prisoner's present competency to be executed); *see also Abu-Ali Abdur'Rahman v. State,* No. M1988-00026-SC-DPE-PD, Order (Tenn. filed Jan. 15, 2002) (stating that allegations of future incompetency are insufficient to delay execution date or obtain hearing on competency to be executed); *State v. Sedley Alley,* No. M1991-00019-SC-DPE-DD, Order (Tenn. filed Jan. 16, 2004) (finding allegation that prisoner will become incompetent at or around the time of execution insufficient to trigger *Van Tran* proceedings). Thus, like the reports of Dr. Rabun and Dr. Woods, Dr. Sultan's report is insufficient to raise a genuine issue regarding Thompson's present competency to be executed. The expert reports indicate, rather, that Thompson is aware of the fact of his impending execution and the reason for it.

The final exhibits attached to Thompson's petition are affidavits of Dana C. Hansen Chavis, an attorney with the

Federal Defenders Services of Eastern Tennessee, Incorporated, ("Federal Defender Services"), who has represented Thompson in the past,[16] and Michael R. Chavis, an investigator with Federal Defender Services. These affidavits recount conversations Dana C. Hansen Chavis and Michael R. Chavis had with Thompson on January 22, 2004, and February 27, 2004, respectively. The affidavit of Dana C. Hansen Chavis relates that, when she advised Thompson the State had filed a motion to set his execution date, Thompson responded: "Don't worry. God told me yesterday I'm not going to die. . . . I'm either going to Hawaii or I'm going back home." Michael R. Chavis's affidavit relates that when he informed Thompson that his execution date had been set by the order of February 25, 2004, Thompson replied: "It's more important than ever that you find my money and uniform." Both Dana C. Hansen Chavis and Michael Chavis opined that Thompson currently is not competent to be executed.

While Thompson's petition and supporting exhibits establish that he is mentally ill, these filings do not raise a genuine issue regarding Thompson's competency. In fact,

[16] The State asserts in its response that, by offering personal testimony on a contested issue, Dana C. Hansen Chavis has disqualified herself and Federal Defender Services from representing Thompson in this matter. The State also says that the Federal Defender Services should be disqualified because its appearance in this proceeding exceeds the scope of its authority under federal law. The State points out that no federal proceedings are presently pending under which a federal judge could authorize Federal Defender Services to represent Thompson in ancillary state-court matters. We need not address these assertions, however, because this Court did not appoint Dana C. Hansen Chavis to represent Thompson in these proceedings but instead appointed Michael Passino and the Public Defender for the Fourteenth Judicial District.

the petition and supporting exhibits undercut Thompson's claim that he currently is not competent to be executed. Under *Van Tran* and *Coe,* Thompson need only understand or be aware of the *fact* of his impending execution and the *reason* for it. *Van Tran,* 6 S.W.3d at 266; *Coe* 17 S.W.3d at 220 (emphasis added). The reports of Thompson's mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane. As previously stated, the fact that a prisoner may suffer from a mental disease or disorder does not automatically equate to a finding of incompetency to be executed. *Coe,* 17 S.W.3d at 221. Furthermore, while Thompson professes unorthodox beliefs about what will happen *after* his execution, these beliefs do not vitiate Thompson's awareness of the fact of his execution and the reason for it. As previously stated, a prisoner's delusional or unorthodox beliefs about what may occur upon death or the prisoner's irrational beliefs about the legal processes and/or the ability of the State to carry out the execution are not pertinent to the question of competency because they do not impede the prisoner's ability to understand the *fact* of the impending execution and the *reason* for it. *See Coe,* 17 S.W.3d at 221-22 (citing *Weeks v. Jones,* 100 F.3d 124, 125 n.3 (11th Cir. 1996) (finding that the prisoner's belief that he would be transformed into a giant tortoise upon his death and rule the universe did not render him incompetent to be executed); *Garrett v. Collins,* 951 F.2d 57, 58 (5th Cir. 1992) (finding the prisoner competent to be executed despite his belief that his deceased aunt would save him through supernatural intervention)). The trial court did not err in concluding that Thompson failed to meet the threshold showing for an evidentiary hearing by establishing that there are genuine issues regarding his present competency to be executed.

Furthermore, Thompson's assertion that the trial court misapplied the law in making its determination is without merit. Thompson points to the trial court's reference to the "high threshold" for obtaining an evidentiary hearing, which he says conflicts with *Van Tran's* simple "threshold showing." Relying upon this language, Thompson claims that the trial court imposed a higher burden than contemplated by *Van Tran.* However, we are convinced that the trial court applied the proper standard in denying Thompson's request for a hearing. Moreover, this Court certainly has applied the proper standard in reviewing de novo Thompson's petition and supporting exhibits and reaches the same conclusion, that Thompson failed to make the required threshold showing. This issue therefore is without merit.

Thompson also argues that the trial court applied an incorrect standard for competence by omitting the "mental capacity component" of *Van Tran.* He contends that the appropriate standard for competence requires that a prisoner have both a rational and factual understanding of the punishment he is about to suffer and the reason for it. According to Thompson, "the prisoner must understand that he will die in the near future (and what it means to die), and that the reason the State will kill him is to punish him for what he did." In addition, Thompson faults the trial court for not applying the "more rigorous" common law assistance standard for competence articulated in *Jordan v. State,* 124 Tenn. 81, 135 S.W. 327 (1911), and argues that this Court should hold that a prisoner is not competent to be executed unless the prisoner is "aware of the penalty and its purpose [and possesses the ability] to assist in his or her own defense."

Initially we note that this Court expressly rejected the more stringent *Jordan* assistance test as the standard for competency to be executed, observing that neither the Eighth Amendment to the United States Constitution nor precedent of this Court requires the stricter standard. *Van Tran,* 6 S.W.3d at 266 ("We agree with Justice Powell that in a proceeding to determine competency to be executed, only those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve").

Moreover, in *Coe,* this Court refused to engraft upon the term "awareness," a highly technical meaning. Pointing to the prisoner's delusional beliefs about what would happen at the moment of his death ("he will just simply be in another place in the same body, will visit his ex-wife and child" and "when he is given the needle . . . he will then be out of prison and he will be walking around"), Coe argued that, although he had an "awareness" of his impending execution, he lacked an "understanding" of it. *Coe,* 17 S.W.3d at 219-20. This Court instructed, however, that for purposes of determining competency, the terms "awareness" and "understanding" should be given their ordinary, common meanings, not the technical meanings these words may have in the field of psychology or psychiatry. Thus, we concluded that the requirements of *Van Tran* were satisfied because the record clearly reflected Coe "knows that he was sentenced to death for murdering a young girl." *Coe,* 17 S.W.3d at 221. Simply put, a prisoner need only be aware of "the *fact* of his or her impending execution and the *reason* for it" to satisfy the competency required for execution of the death sentence. *Id.* at 220 (emphasis added). The trial court and this Court on de novo review have properly applied this standard in

concluding that Thompson failed to establish a genuine issue regarding his competency and in denying his petition without a hearing.

V. Conclusion

For all these reasons, and after fully considering the entire record in this cause, the trial court's judgment dismissing Thompson's petition is affirmed. This opinion is not subject to rehearing under Tennessee Rule of Appellate Procedure 39, and the Clerk is directed to certify this opinion as final and immediately issue the mandate. As provided by this Court's order of February 25, 2004, the Warden of the Riverbend Maximum Security Institution, or his designee, shall carry out the appellant's execution in accordance with Tennessee law on the 19th day of August, 2004, unless a stay is entered by this Court or by a federal court.[17] Counsel for Gregory Thompson shall provide to the Office of the Appellate Court Clerk in Nashville a copy of any order of stay. The Clerk shall expeditiously furnish a copy of any stay order to the Warden of the Riverbend Maximum Security Institution.

/s/ Frank F. Drowota III
FRANK F. DROWOTA III,
CHIEF JUSTICE

[17] The State contends that this Court should reconsider its prior order setting Thompson's execution for August 19, 2004, and re-set Thompson's execution to the earliest possible date. The State argues that reconsideration is justified because of the risk of re-litigation of the issue of competency and the potential for false claims and intentional delay. We decline to grant reconsideration.

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

I concur in Sections I and II of the majority opinion. I dissent, however, from the majority's conclusion that the petitioner has failed to make a threshold showing sufficient to warrant a hearing on his competence for execution.

In *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999), this Court adopted a "cognitive test," for determining competency for execution, and held that under Tennessee law a prisoner is not competent to be executed "if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Id.* at 266. *Van Tran* established a procedure whereby a prisoner alleging incompetency to be executed was required to make a "threshold showing" in the trial court where he was convicted "that his or her competency to be executed is genuinely in issue." *Id.* at 268. The Court explained what was meant by "threshold showing" as follows:

> [W]e adopt a rule that places the burden on the prisoner to make a threshold showing that he or she is presently incompetent. This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached to the prisoner's petition should be from psychiatrists, psychologists, or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Id. at 269 (citations omitted). The purpose of this threshold requirement is to avoid conclusory petitions and specious claims of incompetency made solely for the purposes of delaying execution. *Id.* at 268-69.

In this case, counsel for the petitioner submitted voluminous evidence of mental illness dating back at least eighteen years.[1] Furthermore, three highly qualified experts – two psychiatrists and one psychologist – submitted affidavits in support of the petition for a hearing on competency. All three opined that the petitioner suffered from severe, ongoing schizophrenia, and currently "lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Report of Dr. John S. Rabun, M.D.*, p. 14 (January 28, 2004).[2]

In light of the foregoing evidence in the record, I disagree with the majority's conclusion that there is no "genuine, disputed issue" in this case to meet the threshold requirement. The majority cites to *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000), for the proposition that mental illness alone is insufficient to meet the threshold requirement. In that case, however, prior to this Court's

[1] At one point, the petitioner's condition was so severe that, *on motion of the State Attorney General*, the Chancery Court for the Twentieth Judicial District appointed a conservator to make decisions regarding the petitioner's mental health and medical treatment.

[2] Likewise, Dr. Faye E. Sultan opined, "Mr. Thompson currently lacks the capacity to understand the fact of his scheduled execution or the reason for it." *Report of Dr. Faye E. Sultan, Ph.D.*, p. 3 (February 27, 2004). Dr. George W. Woods stated "Mr. Thompson remains so grossly psychotic that only the most superficial interrogation would not only reveal his profound psychosis, but his current incompetency [to be executed]." *Report of Dr. George W. Woods, M.D.*, p. 2 (February 27, 2004).

conclusion that Coe was competent to be executed, Coe actually had the benefit of a full competency hearing, where the facts of his mental status were thoroughly explored. Thus, I find *Coe* distinguishable. In my mind, there is a difference between requiring a "threshold showing" and requiring conclusive proof, as the majority seems to require here. Accordingly, I respectfully dissent. I would remand to the trial court for a full hearing on the issue of competency to be executed.

/s/ Adolpho A. Birch, Jr.
ADOLPHO A. BIRCH, JR., JUSTICE

(12)

No. 04-514

Supreme Court, U.S.
FILED
NOV 18 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

RICKY BELL, WARDEN
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Dana C. Hansen Chavis
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(865) 637-7979

Counsel of record for Petitioner

No. 04-514

In the Supreme Court of the United States

RICKY BELL, Warden, Petitioner

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Dana C. Hansen Chavis
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Of Eastern Tennessee, Inc.
530 South Gay Street Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel of record for Respondent

Comes the Respondent, Gregory Thompson, and asks leave to file the attached response to petition for writ of certiorari without prepaying of costs and to proceed *in forma pauperis.*

Respondent has previously been granted leave under 21 U.S.C. § 848(q) to proceed *in forma pauperis* in the following courts:

(1) The United States Court of Appeals for the Sixth Circuit (attached), and

(2) The United States District Court for the Eastern District of Tennessee(attached).

Respondent's affidavit or declaration in support of this motion is attached.

Dana C Hansen Chavis

Dana C. Hansen Chavis
Federal Defender Services
Of Eastern Tennessee, Inc.
530 South Gay Street Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel of record for Respondent

Case No: 00-5516
UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED

MAY 16 2000

LEONARD GREEN, Clerk

GREGORY THOMPSON

Petitioner - Appellant

v.

RICKY BELL, Warden

Respondent - Appellee

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OF EASTERN TENNESSEE

Upon consideration of the appellant's motion to proceed in forma pauperis,

It is ORDERED that the motion be and it hereby is GRANTED.

Counsel is reminded that an application for a certificate of appealability should not resemble the final brief. A very short statement of the factual and legal argument with reference to the applicable precedent will suffice. Furthermore, as to issues raised pursuant to 28 U.S.C. §2254(d)(1), the petitioner should abide by the Supreme Court's pronouncement in William v. Taylor, 120 S.Ct.1495, 1523 (2000).

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GREGORY THOMPSON)
)
vs.) 3 98-0040
) Civil Action No.
RICKY BELL, WARDEN) Judge Robert L. Echols
)

FILED
JAN 23 4 52 PM '98
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY _____ D.C. CLERK

ORDER

The Court has before it a Motion and Application to Appoint Counsel to Investigate, Prepare and File Petition for Writ Habeas Corpus in Capital Case and to Stay Execution, and an Affidavit of Indigency.

It appears from the Affidavit of Indigency that the petitioner is unable to pay costs or give security therefor. Accordingly, the application to proceed in forma pauperis is GRANTED, and the Clerk is directed to file the petition in forma pauperis. 28 U.S.C. § 1915(a).

The Clerk is directed to serve a copy of the petition (and related papers) on the Respondent and the Attorney General of the State of Tennessee by certified mail. However, for the reasons stated below, the Respondent shall not be required to file an answer or other pleading to the petition at this time.

The Petitioner attacks the legality of his confinement under a judgment of conviction on charges of first degree murder entered by the Criminal Court for Coffee County, Tennessee. Following his conviction, he received a death sentence. The execution date is currently scheduled for February 20, 1998.

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 1-29-98 By

ATTEST: A true copy
Certified this JAN 29 1998
R. MURRY HAWKINS, CLERK
by Deputy Clerk

(3)

The Petitioner's Motion to Stay Execution is GRANTED, and the execution date is hereby STAYED pending the outcome of this matter.

Pursuant to 28 U.S.C. § 2241(d), this Court may transfer the Petitioner's Petition for Writ of Habeas Corpus to the district court for the district in which the Petitioner was tried and convicted. Accordingly, in the interest of justice, judicial economy and convenience of the parties and witnesses, this action is transferred to the United States District Court for the Eastern District of Tennessee. 28 U.S.C. § 123(c)(2).

IT IS SO ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Gregory Thompson, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ ∅	$ 0	$ ∅	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ ∅	$ 0	$ ∅	$ 0

2. List your employment history for the past two years, most recent first. (Gross mo is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthl
n/a			$
			$
			$

3. List your spouse's employment history for the past two years, most recent empl (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthl
n/a			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any othe institution.

Financial institution	Type of account	Amount you have	Amount your spou
		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not lis and ordinary household furnishings. none

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse mor amount owed. n/a

Person owing you or your spouse money	Amount owed to you	Amount owed to y
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. none

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately paid by your spouse. Adjust any payments that are made weekly, biweekly, annually to show the monthly rate. n/a

	You	Your s
Rent or home-mortgage payment (include lot rented for mobile home)	$	$
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

	You	Yo
Transportation (not including motor vehicle payments)	$_____	$_
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$_____	$_
Life	$_____	$_
Health	$_____	$_
Motor Vehicle	$_____	$_
Other: _____	$_____	$_
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$_____	$_
Installment payments		
Motor Vehicle	$_____	$_
Credit card(s)	$_____	$_
Department store(s)	$_____	$_
Other: _____	$_____	$_
Alimony, maintenance, and support paid to others	$_____	$_
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_
Other (specify): _____	$_____	$_
Total monthly expenses:	$_____	$_

9. Do you expect any major changes to your monthly income or expenses or in yo liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a typist) any money for services in connection with this case, including the com form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the cos

Incarcerated on death row since 1985

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 21, 2004

Greg Thompson
(Signature)

44530

ount: 00108406 THOMPSON, GREGORY Actual Site: RMSI
tus: ACTV Sex: M Race: B Age: 42 Assigned Site: RMSI
rent Balance: 0.76 Pending Balance:

Trans Date	Seq No	Transaction Type/Code/Amount		Trans Site	Current Amount	Pend Amount
10/11/2004	3	D	COM 3.41	RMSI	0.76	
10/11/2004	2	D	COM 2.83	RMSI	4.17	
10/11/2004	1	D	MED 3.00	RMSI	7.00	
10/06/2004	1	C	PMO 10.00	RMSI	10.00	
10/05/2004	1	D	COM 1.20	RMSI		
09/22/2004	1	C	COC 0.84	RMSI	1.20	
09/20/2004	2	D	COM 2.04	RMSI	0.36	
09/20/2004	1	D	COM 23.16	RMSI	2.40	
09/13/2004	2	C	PMO 20.00	RMSI	25.56	
09/13/2004	1	D	COM 4.72	RMSI	5.56	

earch:
XT FUNCTION: DATA:
.-HELP F8-PAGEDOWN F9-QUIT F11-SUSPEND

OP OF LIST

Linda Pollock Trust Fund at RMSI 10-21-04

Lesli Hatley

LESLI HATLEY NOTARY PUBLIC AT LARGE MONTGOMERY CO. TENN.

My Commission Expires June 19, 2007

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No. 04-514

In the Supreme Court of the United States

RICKY BELL, WARDEN
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Dana C. Hansen Chavis
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Of Eastern Tennessee, Inc.
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(865) 637-7979

Counsel of record for Respondent

QUESTIONS PRESENTED

I. When the State of Tennessee, through Petitioner, sought to execute death row inmate Gregory Thompson with disregard for the non-finality of federal proceedings, including the State's own unresolved motion, and without first seeking to finalize those proceedings, can Tennessee later be heard to complain about those federal proceedings in this Court?

II. Does a case or controversy exist where Tennessee argues it has been prejudiced by the Court of Appeals' stay of execution and remand for further district court proceedings but disregards the fact that Thompson's execution had already been stayed by the district court and disregards the fact that further district court proceedings were already under way?

III. Does the United States Court of Appeals for the Sixth Circuit have the same power to supplement the record on appeal as its Sister Circuits?

IV. Did the United States Court of Appeals for the Sixth Circuit have the power, under the particularly narrow circumstances of this case, to *sua sponte* reconsider its decision prior to the issuance of the mandate?

V. Did the Sixth Circuit Court of Appeals have to address 28 U.S.C. §2254(e)(2) even when the facts at issue were presented to the state courts? If so, did the Sixth Circuit substantially comply with §2254(e)(2) by recognizing a lack of funding prevented factual development in state court?

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I. Petitioner sought to execute Thompson, without taking steps to attempt to finalize the federal case, knowing the Court of Appeals was still considering Petitioner's motion and had not issued the mandate. Given these circumstances, this Court should not entertain Petitioner's alleged grievance. ..... {21}

II. Petitioner alleges no injury in fact where the Sixth Circuit decision does not alter the present posture of this case and where the State was not prejudiced because Thompson's execution had already been stayed by the district court and further district court

proceedings were already under way when the Sixth Circuit decision issued ..... {23}

III. The United States Court of Appeals for the Sixth Circuit can *sua sponte* reconsider its decision prior to the issuance of the mandate. ..... {27}

IV. The United States Court of Appeals for the Sixth Circuit permissibly exercised its inherent equitable power to supplement the record on appeal ..... {34}

V. Under the circumstances of this case, 28 U.S.C. §2254(e)(2) is not triggered because the state courts were presented with the evidence considered by the Sixth Circuit Court of Appeals. Nevertheless, the Sixth Circuit substantially complied with §2254(e)(2). ..... {36}

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OPINIONS BELOW

On June 23, 2004, the United States Court of Appeals for the Sixth Circuit issued an opinion, published at 373 F.3d 688, withdrawing its earlier opinion, vacating the judgment of the United States District Court for the Eastern District of Tennessee and remanding the case to the district court for further proceedings. The court also stayed Thompson's execution for 180 days to permit the district court time to proceed. (Pet. App.1, 6). The June 21, 2004, order of the district court staying Thompson's execution pending further district court proceedings is unreported (App. 1). The opinion of the district court summarily denying Thompson's habeas petition, which is to be vacated, is unreported. (Pet. App.202).

JURISDICTION

The Sixth Circuit's judgment was entered on June 23, 2004 (Pet. App.1). Petitioner did not seek rehearing. The time for filing a petition for writ of certiorari was extended to October 13, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FED. R. APP. PRO. RULE 40 - Petition for Panel Rehearing -

(a) Time to File; Contents; Answer, Action by the Court if Granted.
(4) Action by the Court. ... the court may do any of the following:
(A) make a final disposition of the case without reargument;
(B) restore the case to the calendar for reargument or resubmission, or
(C) issue any other appropriate order

FED. R. APP. PRO. RULE 41 - Mandate, Issuance and Effective Date; Stay -

(b) When Issued. ...The court may shorten or extend the time.
(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

28 U.S.C. §2254(e)(2) - State custody; remedies in Federal Courts

(e) (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(A) the claim relies on -

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

STATEMENT OF THE CASE

Procedural Overview

Last year a three-judge panel of the Sixth Circuit Court of Appeals issued a fractured decision affirming the district court's denial of habeas relief in a 2-1 vote and three separate opinions. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003)(Suhrheinrich, J., delivered the opinion of the court; Moore, J., delivered a separate opinion concurring in the result only; Clay, J., delivered a separate dissenting opinion). *See also Thompson v. Bell*, 373 F.3d 688, 689 (6th Cir. 2004)(acknowledging the "panel in a split decision" produced "three different opinions."). Thompson requested and received a stay of the Sixth Circuit's mandate and petitioned this Honorable Court for a writ of certiorari. *Thompson v. Bell*, No. 03-5759. During certiorari proceedings, Petitioner filed a motion with the Sixth Circuit requesting that the court reconsider one of its previously entered orders.[1] Thompson filed a response in opposition to Petitioner's

[1]During the pendency of Thompson's petition for writ of certiorari, Petitioner filed a motion asking the Sixth Circuit to reconsider its prior order permitting Thompson's

motion. After this Court denied review, but before resolution of Petitioner's motion and the issuance of the Sixth Circuit's mandate, the State of Tennessee, through Petitioner, sought and received from the Tennessee Supreme Court a date to execute Thompson. Despite the individual opinions of three mental health professionals that Thompson was not competent for execution, the Tennessee courts denied him a *Ford* hearing[2] and allowed the execution to go forward.[3] Shortly thereafter, the United States District Court for the Eastern District of Tennessee entered a stay of execution to consider Thompson's *Ford* claim (App.1). Next, the Sixth Circuit, after reconsidering the case *sua sponte* and expanding the record on appeal, corrected its earlier decision. *See* FED. R. APP. PRO. 40. The newly united panel remanded the case to the district court for further proceedings on Thompson's Sixth Amendment ineffective assistance of counsel claim. *Thompson*, 373 F.3d at 692. Petitioner sought and obtained a stay of the Sixth Circuit's mandate and filed the instant petition.

Pre-trial

Thompson's trial counsel knew that Thompson's mental state was an issue for the defense (Apx. 852, 845[4]). Under the circumstances of the case, trial counsel could understand kidnapping the victim to obtain her car but could not understand why the

counsel permission to appear in ancillary state court proceedings (App. 223). That motion remains pending to this day.

[2]*Ford v. Wainwright*, 477 U.S. 399 (1986).

[3]*Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). The parties' filings can be viewed at www.tsc.state.tn.us/OPINIONS/TSC/CapCases/ThompsonG/ThompsonG.htm

[4]Citations to "Apx. _" refer to the joint appendix filed with the Sixth Circuit.

victim had been killed when there were other alternatives and knew that the jury would have the same lingering question (Apx. 830).

Counsel filed a notice of insanity defense (Apx. 775) and requested a mental health evaluation of Thompson (Apx. 18, 770). Counsel wanted

> a psychiatric examination and a neurological examination to determine whether Thompson was competent to stand trial and assist counsel with his defense, whether Thompson was suffering from a mental illness on the date of the offense, and whether he was in need of hospitalization for further psychiatric treatment and evaluation. In support, [trial attorney] Parsons attached an affidavit stating that Thompson had previously suffered two concussions...

Thompson, 315 F.3d at 572. The trial court sent Thompson to Middle Tennessee Mental Health Institute ("MTMHI"), a state facility, for an evaluation of sanity and competency (Apx. 19, 21, Apx. 23). "MTMHI's records contained only sketchy information related to Thompson's history before ... the murder." *Thompson*, 373 F.3d at 727. The MTMHI records did contain staff notes of Thompson's unusual and inappropriate behavior on the ward (Trial Transcript V.20 p.161-162). Dr. Watson, of MTMHI, said Thompson reported hearing voices and said he could not read or write (*id.* at p.53-154). The MMPI administered at the state facility revealed a schizophrenic score "at the top of the graph" but Dr. Watson discounted this score as an attempt by Thompson to endorse all psychotic features, in other words, he was "malingering" (*id.* at 153). Another test, however, showed Thompson was defensive and tried to portray himself in a good light (*id.* at 156) and at no time during his 30-day evaluation at MTMHI did Thompson assert a mental health defense to the crime. MTMHI staff concluded Thompson was mentally competent to stand trial and was not insane at the time of the crime.

Counsel asked for funding, pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), to hire a psychiatrist "because they questioned the reliability of the forensic team at MTMHI;" because "Thompson told counsel about his head injuries;" and, because "Thompson's mental status was in issue after he was charged in this case, he was going to be on trial for his life, and the state was going to present evidence of his future dangerousness," *Thompson*, 315 F.3d at 572-573 (lead opinion), 599 (dissent). The request was granted "for the purpose of affording counsel the benefit of private expert psychiatric consultation in regards to the defendant ... to ensure that the constitutional rights of the defendant are properly protected" (Apx. 24).

Despite (a) the court's order approving a psychiatrist to examine Thompson and assist the defense; (b) trial counsel's knowledge that the State would have psychiatric and other medical opinions of Thompson at its disposal; (c) counsel's skepticism of the MTMHI conclusions; (d) the fact that "counsel were aware that Thompson exhibited possible symptoms of mental illness" and knew "Thompson was experiencing 'extreme mood changes' ... [and] ... knew of Thompson's violent behaviors in the military, which were in stark contrast to Thompson's previous history," *Thompson*, 373 F.3d at 729; and (e) the *Ake* prescription of "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," *Ake*, 470 U.S. at 83, counsel did not use the funds to hire a competent forensic mental health expert. Counsel claimed the effort to hire a psychiatrist simply "was not successful" (Apx. 860), however, trial attorney Richardson admitted "he probably could have" found a psychiatrist to say Thompson had brain damage,

Thompson, 315 F.3d at 578. Instead, counsel used the court-ordered mental health funds to hire Dr. Copple, who was not a competent psychiatrist but an "industrial psychologist" (Apx. 773). Counsel did not ask him to investigate Thompson's mental health for mitigation purposes or to conduct an evaluation for purposes of rebutting the findings of the MTMHI team.

Dr. Copple "did not take a thorough history" and was unaware of Thompson's psychotic symptoms. *Thompson*, 373 F.3d at 727-728. Consistent with his background and training, the industrial psychologist stated his examination of Thompson focused on "what things he might be capable of doing in a prison situation" (Trial Transcript, V.18 p.121). Later on, counsel admitted that Dr. Copple – whom they had selected and hired with the court-approved funds – "was not an expert in criminal behavior" (Apx. 77) (emphasis added).

Trial

Counsel conceded guilt and did not defend the guilt phase case (Apx. 848). Counsel simply told the jury that during the crime Thompson's "decision-making abilities by this time had apparently gone completely down the drain" (Trial Transcript V.13 p.32) and the only explanation was "ineptitude and being harebrained and a bad decision maker and something having snapped in him." (*Id.* at p.36). Counsel's closing argument again conceded guilt and told the jury, "[s]omehow, this is a situation without an explanation" (Trial Transcript V.16 p.85) and "I don't know why this happened." (*Id.* at p.92). Thompson was convicted of first degree murder.

Counsel did promise during opening argument to tell the jury "who Greg

Thompson is" (Trial Transcript V.13 p.21) and promised they would "do everything we could to let you know Greg Thompson", (*e.g.*Trial Transcript V.21 p.46).[5] Counsel promised the jury he would "take you through his life, show you what his background is, show you the influence in his life, which make us what we are I guess. We are going to give you everything along that line that we can." (Trial Transcript V.13 p.38). Although counsel promised the jury "we are going to trace his whole life because that's the way you will learn the most about him" (Trial Transcript V.17 p.40), without adequately investigating Thompson's life history and unassisted by a competent mental health expert, counsel could not explain Thompson's drastic change in behavior subsequent to high school. At the punishment phase, counsel offered the jury what little information they had: witness testimony about Thompson's good acts and exemplary behavior up through his high school years (Apx. 859); his prior head injuries (Apx. 831); and Thompson's recent, radical change in behavior (Apx. 800).

But Thompson's changed behavior remained unexplained. As Judge Clay observed in his initial dissenting opinion:

> *[W]hat Thompson needed at the sentencing phase of the trial was not an industrial psychologist opining about whether Thompson would "thrive" in prison, but a qualified expert who would help him escape the death penalty by giving testimony about his mental condition so as to convince the jury that the mitigating circumstances outweighed the aggravating factors. Thompson*, 315 F.3d at 604.

Without obtaining a comprehensive social history, the evidence of which "was not subtle," *Thompson*, 373 F.3d at 728, and without a competent mental health expert to

---

[5]Trial counsel made this promise, not once but, at least six times: Trial Transcript V.13 p.21, 38; V.21 p.29, 46, 48, 49.

conduct an appropriate examination, counsel was unable to explain the significance of Thompson's changed behavior or even address – much less counter – the state mental health team's conclusion that Thompson had neither brain damage nor "psycho-motor impairment" (Apx. 832) and, instead, was "malingering" mental illness (Trial Transcript V.20 p.153).

The industrial psychologist ignored Thompson's radical early-adulthood change in behavior and instead proposed that Thompson committed the brutal murder due to a need to nurture people – in this case, co-defendant Joann MacNamara (Apx. 816). Remarkably, Dr. Copple even stated that Thompson was not suffering from any mental illness. *Thompson*, 315 F.3d at 575. This "nurturance" theory was incomprehensible. Judge Clay stated:

> ***Indeed, by accounting for the marked change in Thompson's behavior after he joined the Navy, expert psychiatric testimony supporting the notion that Thompson suffered from mental illness or an adverse mental condition would have provided a plausible explanation for Thompson's "positive qualities" in contradistinction to his subsequent violent behavior. However, by not being able to offer the jury any plausible psychiatric explanation regarding the significance of Thompson's change in behavior as witnessed by Cajulao and others, his trial counsel essentially abdicated their roles as meaningful advocates on behalf of their client. This is because defense counsel had nothing with which to rebut the state's proofs after opening the door to the issue of whether Thompson was a "good person."***

Id. at 606-607 (dissent).

During closing penalty-phase argument, counsel was reduced to begging for mercy, as opposed to arguing the strength of mitigating factors, stating, "[W]e have tried to show you Greg Thompson and an explanation of this crime, so you will understand why we ask for mercy now" (Trial Transcript V.21 p.29). Because of counsel's failures,

Thompson was sentenced to death.

Motion for New Trial

The jury foreman testified during the motion for new trial that the jurors needed to hear "those contributing factors that might have led him [Thompson] to turn from a well-rounded young man, I'll say, to the type of person he turned out to be." He testified:

> He had committed a crime that was just hard to understand. It was even harder to understand when you considered his background. ... but I'm saying he got an A+ until he was 18 years old. On the other hand, in trying to do this, the thing that was probably the most damaging to him--and I realize this might be expounding a little bit, but it is important because this man's life is at stake--from the time he was 18 years of age on, the jury--and they searched--found very little that showed the same good positive person that had been developed previously. In fact, it was overwhelmingly negative. When I say "overwhelmingly," I couldn't put a percentage, but very, very high. We talked about those things because that becomes important when you are considering his capabilities. What we saw was a man that had been trained to be good that had chosen to more or less wallow, if you will excuse the expression, in the mire. Socially, he was doing things that was totally unacceptable at times. (Motion for New Trial, V.1 p.73-74). ...
>
> ...he is in full capacity of all of his emotions and feelings. This man thought he was very cool. That was the most damaging single thing. This said to us, and incidentally this was discussed at length, this said to us that this man had the mental capacity and the reasoning power to be in control of himself and that he had been taught better as a young boy and that he should have known better. He had the principles instilled in him, and that was damaging. (*Id.* at 76).
>
> I have stated, and I believe, that the one fact that was not as developed as I would have thought, out of a case that was as detailed as it was, was his age and those contributing factors that might have led him to turn from a well-rounded young man, I'll say, to the type of person he turned out to be. ... You do not say to take a man's life without being doggone serious, folks. We did that, and we discussed that at length among ourselves; and the conclusion--and I have to say that I agreed with it--was that he was old enough and had the background to have done better than he did; but I do think that probably more could have been done along that line. (*Id.* at 77-

78).

This testimony unequivocally demonstrates that, but for counsel's failure to investigate Thompson's life history and obtain a qualified mental health expert to discover and explain Thompson's changed demeanor, the jury would not have sentenced Thompson to death.

State Post-Conviction

Post-conviction counsel's repeated requests for expert funding were denied (Apx. 839). The prosecutor argued Thompson was not entitled to experts at state expense (Apx. 844). Nor did State law provide for expert services on post-conviction. *Teague v. State*, 772 S.W.2d 915, 927 (Tenn.Crim.App. 1989). In support of the funding requests counsel submitted the affidavit of forensic psychologist, Dr. Gillian Blair, who opined that, based on existing information, Thompson had shown a deteriorating mental status since at least 1985, Thompson was likely suffering from schizophrenia at the time of crime, and further expert evaluation was required (Apx. 862, 882). Specifically, Dr. Blair indicated "a complete social and family history is critical to the establishment of a diagnosis of mental illness." *Thompson*, 373 F.3d at 727 *citing Thompson*, 315 F.3d at 579. The defense was still denied funding so the only expert testimony presented at the post-conviction hearing came from Dr. Blair, who was subpoenaed to testify without compensation and without having the full history that was "needed to determine whether Thompson was schizophrenic at the time of the offense." *Thompson*, 373 F.3d at 729.

Dr. Blair testified that Thompson's treating prison psychiatrists

> had diagnosed him as either having a bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide on a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him. (Apx. 872).

Dr. Blair said schizophrenia and bipolar disorder generally begin in early adulthood (Apx. 878). Thompson's drastic change of behavior subsequent to high school and prior to the instant offense, when he was 17-23 years old, coupled with his history of head injuries which were ignored by the industrial psychologist, actually indicated the onset of mental illness.

The State countered with the argument that Thompson was not mentally ill (Apx. 886), and instead was "malingering" mental illness. Because Thompson was denied funding for Dr. Blair to do a current and complete evaluation and for a mitigation expert to conduct a full investigation and compile a life history, he could not counter the State's argument nor demonstrate *Strickland* prejudice. All counsel could do was submit Thompson's prison medical records into evidence (Apx. 842, 889-1542). The post-conviction court denied relief. The state appellate court affirmed denying Thompson's ineffective assistance of counsel claim on it merits. *Thompson v. State*, 958 S.W.2d 156, 177 (Tenn.Crim.App. 1997).

Federal District Court

Thompson's habeas corpus petition alleged ineffective assistance of trial counsel

via the failure to adequately investigate and obtain adequate expert assistance regarding Thompson's mental health at the time of the offense and failure to direct an expert inquiry into mental health mitigation and to obtain rebuttal evidence against the State's psychiatrist.[6] The State moved for summary judgment, asserting only that the claims were either procedurally barred or the state court decision was not contrary to or an unreasonable application of federal law (Apx. 442) because Dr. Blair had not offered a final opinion on Thompson's mental health at the time of the offense (which, of course, she was prevented from doing by the post-conviction court's denial of funding). The State also asserted Thompson was not entitled to present further evidence in support of his claims in a federal court evidentiary hearing.[7] Thompson responded to the summary judgment motion by asserting that he had not failed to develop the factual basis of his claim; instead, the state trial court had denied him expert funding to do so and the state appellate court, through the after-the-fact application of procedural rules governing the appointment of experts in state post-conviction cases, prevented him from fully developing his claim. Because of these state impediments, Thompson asserted he was entitled to an evidentiary hearing to present further evidence in support of his claims.

When the Federal District Court for the Eastern District of Tennessee issued its decision granting the State's motion for summary judgment, it by-passed the State's

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[6]Thompson further alleged the State of Tennessee failed to disclose exculpatory evidence and/or presented false evidence regarding Thompson's mental illness both during trial and state post-conviction proceedings.

[7]Respondent's motion was decided prior to *Williams (Michael) v. Taylor*, 529 U.S. 420 (2000).

argument as well as Thompson's response and instead held that the claim would be denied because Thompson had failed to present the district court with affidavits or other evidence (Apx. 711). The district court never provided Thompson with notice of its intention to rely on this ground nor did it provide him with an opportunity to present such evidence before entering judgment against him. Thompson had such evidence in his possession and, contrary to the finding of the district court, most of it was in the record. *See Thompson*, 315 F.3d at 607-609; *Thompson*, 373 F.3d at 728-729. Despite this unrebutted evidence, the district court noted from the trial record that "[t]he team at Central State concluded there was no organicity (brain damage) and Dr. Copple [the industrial psychologist] found no indication of brain damage" (Apx. 701). The court ruled that due to a lack of affidavits, "Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute" (Apx. 711). The petition was dismissed.

Sixth Circuit Proceedings

The Sixth Circuit granted a certificate of appealability on September 12, 2000.

After Thompson filed his initial proof brief on November 16, 2000, the State conceded that Thompson has long suffered from mental illness and was then incompetent. On January 11, 2001, the State initiated conservatorship proceedings against Thompson. A state trial court found Thompson to be "disabled" and appointed a conservator. The conservator had the power to make decisions regarding Thompson's medical treatment and the power to consent to forced medication. A notice of supplemental authority was filed in the Sixth Circuit which contained information relative to the conservatorship proceedings and Thompson's mental illness.

The State's appellate brief was filed on February 15, 2001. While successor habeas counsel was preparing Thompson's reply brief (filed on March 9, 2001), it was discovered that the report and deposition of Dr. Faye Sultan had not been filed in the district court record. On March 2, 2001, a FED.R.CIV.PROC. Rule 60(b) motion was filed with the district court requesting the court to enter the report and deposition into the record, consider that information and revise its earlier judgment. A motion was filed in the Sixth Circuit requesting an abeyance until resolution of the 60(b) proceedings. On March 7, 2001, the district court denied the Rule 60(b) motion (Pet. App. 343) and the Sixth Circuit denied the abeyance motion on March 21, 2001 stating that the district court had ruled on the motion (Pet. App.345).

State Court Coram Nobis Proceedings

On May 29, 2001, a petition for writ of error *coram nobis* was filed in the state trial court pursuant to TENN. CODE ANN. § 40-26-105, *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) and *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001) (holding *coram nobis* is an available remedy for newly discovered evidence). (App.6). A reply to the State's response was filed on July 19, 2001, to which was attached Dr. Sultan's report and deposition (App.26). The state trial court's denial of *coram nobis* relief on September 5, 2001 (App.194) was affirmed by the Tennessee Court of Criminal Appeals on August 15, 2002 (App.199). The Tennessee Supreme Court denied Thompson's application for permission to appeal on December 23, 2002 (App.205).

Sixth Circuit Proceedings, continued

On June 4, 2001, Thompson filed a notice of recent filing alerting the Court of

Appeals to the fact that a *coram nobis* petition was pending in the state trial court raising the new information obtained from the State-initiated conservatorship proceedings. A motion to hold the appeal in abeyance pending resolution of this related state court proceeding was also filed. The State opposed the abeyance motion and the court denied the motion on June 22, 2001 (App.207). On July 3, 2001, Thompson alerted the Court of Appeals to the State's then recent position on Thompson's mental state (App.209).

Oral Argument Before the Sixth Circuit Court of Appeals

Oral argument was held on November 1, 2001. When asked by the panel "whether Dr. Crown stated in his deposition that Thompson's schizo-affective disorder may have begun while he was in the Navy?", the State responded,

> "Dr. Crown testified that he had, that Thompson suffered from psychological impairments for many years. He testified that he began having, and this may be as close as I can get, a more difficult time in his life in the last stages of his military service. He testified that the beginning of psychological disorders could be tracked to there, so there was some suggestion in his testimony that there may have been some, he used the word difficulties, he used the word psychological problems, impairments, reaching as far back to his military service."

In response to the follow up inquiry, "which, of course, was before the murder?", the State agreed, "it was before the time of the murder, that's correct."

Again, during oral argument before the panel, the State was asked to hypothesize, based on facts in the record:

> suppose the next day [after Thompson was incarcerated] he starts exhibiting schizophrenic behavior and he is diagnosed shortly thereafter with schizophrenia, why would that not be highly suggestive that at least at the time of his trial he was schizophrenic?

The State again agreed, responding:

> "Well, I, Your Honor, I think that it could be highly suggestive that he was schizophrenic at the time of his trial. It doesn't necessarily mean he was incompetent to stand trial [question omitted] And it doesn't necessarily mean that he was insane at the time of the offense [question omitted] It could be relevant as a mitigating factor."

Federal Court Proceedings, continued

The Sixth Circuit Court of Appeals issued a fractured decision affirming the district court with a 2-1 vote and three separate opinions, *Thompson*, 315 F.3d 566; *see also Thompson*, 373 F.3d at 689. Essential to the initial conclusion that Thompson was not denied effective assistance of counsel was Judge Suhrheinrich's finding that Thompson "has never submitted *to any court* any proof that he suffered from severe mental illness at the time of the crime." *Thompson*, 373 F.3d at 692 (emphasis supplied) *quoting, Thompson*, 315 F.2d at 590. Judge Moore concurred in the result as determined by Judge Suhrheinrich stating,

> While I have sympathy for the view expounded in the dissent ... I cannot conclude that Thompson's trial counsel was constitutionally ineffective ... because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of the crime.

Thompson, 315 F.3d at 595.

Judge Clay dissented finding "the state court's conclusion that Thompson's trial counsel were not constitutionally ineffective was an unreasonable application of *Strickland* ... ." *Id.* at 596. Judge Clay found Thompson's case "fits squarely within the line of [Sixth Circuit] cases in which counsel's failure to have a reasonable trial strategy in a capital case constitutes ineffective assistance of counsel." *Id.* at 599; *see also id.* at 609-610. He would have reversed the district court's judgment and remanded the

case to the district court for issuance of a conditional writ of habeas corpus. *Id.* at 596, 610.

Thompson's petition for rehearing *en banc* was denied on March 10, 2003. On March 24, 2003, the Court of Appeals granted Thompson's motion to stay issuance of the mandate pending his petition for certiorari (App.216).

Not long after, the panel questioned whether its decision to affirm the district court's denial of habeas relief was mistaken or improvident. *Thompson*, 373 F.3d at 693, 694.

On August 21, 2003, Petitioner moved the Court of Appeals to reconsider an order dated July 26, 2002 (App.223). [8] Thompson filed a response on August 28, 2003 (App.237).

On December 1, 2003, this Court denied certiorari review. *Thompson v. Bell*, 124 S.Ct. 804 (2004). Thompson petitioned for rehearing. Thompson's request of the Court of Appeals to continue the stay of the mandate was granted on December 12, 2003 (App.216). On January 20, 2004, this Court denied the petition for rehearing. *Thompson v. Bell*, 124 S.Ct. 1162 (2004).

The following day, January 21, 2004, Petitioner moved the Tennessee Supreme Court to set an execution date for Thompson (App.218). On January 23, 2004, the Sixth Circuit Court of Appeals received this Court's order denying rehearing.

On February 25, 2004, the Tennessee Supreme Court set Thompson's execution date for August 19, 2004, and remanded the case to the state trial court for a

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[8] Petitioner asked the Sixth Circuit to withdraw its order expanding the appointment of undersigned counsel to include state court proceedings.

determination on Thompson's competency to be executed. Although affidavits from three mental health professionals stated Thompson was incompetent to be executed, the state trial court dismissed the case without a hearing. The Tennessee Supreme Court affirmed. *Thompson v. Bell*, 134 S.W.3d 168 (Tenn. 2004).

On June 14, 2004, a motion for stay of execution and a petition for writ of habeas corpus was filed in the federal district court raising the *Ford v. Wainwright*, *supra*, claim.[9] On June 21, 2004, the district court entered a stay of execution pending a determination on the petition (App.1).

On June 23, 2004, the newly-united panel of the Court of Appeals issued an opinion vacating the district court judgment, remanding to the district court for further proceedings and entering a 180-day stay of execution. *Thompson*, 373 F.3d 688. The Sixth Circuit panel unanimously agreed to correct its earlier opinion, expanded the appellate record and remanded the case to the district court. Speaking for the court, Judge Suhrheinrich found Thompson's trial counsel ineffective:

> In sum, trial counsels' conduct failed to render effective assistance of counsel guaranteed by the *Sixth Amendment* by failing to conduct a reasonable investigation of Thompson's social history and present powerful, readily available mitigating evidence, and by failing to pursue known leads that might have helped them to prepare their case in mitigation.

Id. at 729 (Suhrheinrich, J., concurring).[10]

On July 1, 2004, Petitioner moved for a stay of the Court of Appeals' mandate

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[9]The district court previously dismissed this claim without prejudice on ripeness grounds (Pet. App.326).

[10]Justices Moore and Clay said "Judge Suhrheinrich summarizes most effectively" the ineffective assistance of counsel issue. *Thompson*, 373 F.3d at 690.

which was granted on July 21, 2004. On September 22, 2004, Petitioner moved for a further stay of the mandate which was granted on September 28, 2004.

SUMMARY OF THE ARGUMENT

The petition should be denied. Petitioner's alleged harm is that the Court of Appeals entered a stay of execution and derailed the State's attempt to execute Thompson. But Thompson's execution had already been stayed by the federal district court when the Sixth Circuit opinion issued. Additionally, Petitioner knew the Sixth Circuit proceedings were not final because a motion filed by Petitioner was still pending and the mandate had not issued. Petitioner did not attempt to finalize the Sixth Circuit proceedings or seek issuance of the Sixth Circuit mandate before invoking state court proceedings to execute Thompson. Under these circumstances, this Court should not entertain Petitioner's alleged grievance.

Petitioner alleges no injury in fact where the Sixth Circuit decision does not alter the present posture of this case and where the State was not prejudiced because Thompson's execution had already been stayed by the district court and further district court proceedings were already under way when the Sixth Circuit decision issued. Any alleged harm to Petitioner was caused by the stay of execution entered by the district court, however, the district court's actions are not disputed in the petition.

Petitioner is merely appealing an order remanding the case to the district court for further proceedings. Any suggestion that the Sixth Circuit's order might cause confusion is simply speculation which lacks the immediacy and reality required for this Court to review the substantive issues presented in the petition.

It is well settled that a court of appeals retains jurisdiction over a case until the

mandate issues. It is also well settled that intervening Supreme Court proceedings do not strip from a court of appeals control of its mandate if the mandate is stayed for a reason independent of the certiorari proceedings and prior to receipt of the order denying certiorari. Also, the inherent authority of an appellate court to conduct a *sua sponte* rehearing of a case over which it maintains jurisdiction is well established. These are the circumstances presented in this case which distinguish it from *Calderon* and, in fact, place this case squarely within the exception to the rule of *Calderon*. Accordingly, this case does not present a violation of *Calderon*. It is simply a case where the Sixth Circuit exercised its discretion to *sua sponte* reconsider its decision prior to the issuance of the mandate. There are no compelling reasons for this Court to review the decision below.

The overwhelming majority of circuit courts of appeal agree that a court of appeals has the inherent equitable power to supplement the record on appeal. The Sixth Circuit's exercise of its discretion to supplement the record in Thompson's case is consistent with well-settled authority and presents no circumstances worthy of this Court's review.

The state courts were presented with the facts at issue so 28 U.S.C. §2254(e)(2) is not triggered in this case. Even if it were, the Sixth Circuit substantially complied with that provision when it found that Thompson was denied funding required for the development of the facts. These circumstances distinguish this case from *Holland v. Jackson* therefore presenting no conflict with this Court's caselaw or any compelling reason for this Court's review. The petition should be denied.

ARGUMENT

I. Petitioner sought to execute Thompson, without taking steps to attempt to finalize the federal case, knowing the Court of Appeals was still considering Petitioner's motion and had not issued the mandate. Given these circumstances, this Court should not entertain Petitioner's alleged grievance.

Petitioner alleges the state court set an execution date "[b]elieving that Thompson's federal habeas case was once and for all final" (petition p.15, 27).[11] What Petitioner neglects to reveal is that the State sought an execution date on January 21, 2004, the day after this Court denied Thompson's petition for rehearing (App.349). At the time the State sought an execution date, the last entry on the Sixth Circuit's docket for this case reveals an "order granting motion to continue stay of the mandate" dated December 12, 2003. At the time the State sought an execution date, the Sixth Circuit had not even received notice from this Court that rehearing had been denied. That notice was not received until January 23, 2004. Clearly, when the State sought an execution date the Sixth Circuit's mandate had not issued and the State did not, as alleged, rely "on the apparent finality of the federal judgment" (petition p.16).

The State cannot genuinely claim to be "surprised" by the Sixth Circuit's opinion (petition p.28). Even a cursory review of the docket would reveal that on the day the State sought an execution date the Sixth Circuit was unaware of the action in this Court and the mandate had not issued. The idea that the Sixth Circuit was working "behind the scenes" (petition p.16) to "frustrate[] the comity between the federal and state

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[11]The Tennessee Supreme Court relied upon and accepted Petitioner's representation that Thompson's "three-tier appellate review process was completed." (App.220).

courts" (petition p.17, 28) is belied by the fact that it was Petitioner who initiated state court proceedings to execute Thompson before the Sixth Circuit mandate issued.

Petitioner concedes the mandate had not issued in this case (petition p.19) but complains that no further order was entered by the Sixth Circuit and laments that "[t]he mandate simply did not issue." (Petition p.19). However, Petitioner fails to mention that there was good cause for the court to not immediately issue the mandate: Petitioner had a pending motion before the court. *Thompson*, 373 F.3d at 726 n. 12. Petitioner did not seek to finalize this proceeding by either asking for expedited consideration of its motion or moving to withdraw the motion. Petitioner also failed to move for issuance of the mandate or lodge an objection with the Court of Appeals. At the time, Petitioner paid no heed to the fact that the mandate had not issued and instead invoked state court procedures and pursued Thompson's execution.

Even after the Sixth Circuit issued an opinion adverse to Petitioner, Petitioner did not seek panel reconsideration or rehearing *en banc* to give the Court of Appeals an opportunity to first address Petitioner's grievance. Instead, Petitioner brought his unpreserved claim directly to this Court in search of a favorable determination.[12]

> No procedural principle is more familiar to this Court than that constitutional rights, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

United States v. Olano, 507 U.S. 725, 731 (1993) *quoting Yakus v. United States*, 321

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[12]As stated by Chief Justice Taft in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923):

> The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

U.S. 414, 444 (1944). "While this Court in its discretion sometimes departs from this rule in cases from lower federal courts," *Yakus*, 321 U.S. at 444-445, that discretion is exercised "sparingly," *Jones v. United States*, 527 U.S. 373, 389 (1999), and the Court "invariably adheres to [this rule] in cases from state courts." *Yakus*, *supra* at 445. Petitioner did not raise an objection before the Sixth Circuit, thereby denying that court an opportunity to first address the issues raised in the instant petition. Therefore, the issues raised should be deemed forfeited. Further, it was Petitioner's motion that remained pending before the Court of Appeals and Petitioner did not seek resolution of that motion before initiating state court proceedings to execute Thompson. Lastly, under these circumstances, Petitioner could not and did not, in fact, detrimentally rely upon "the apparent finality" of the federal proceedings. For these reasons, the petition should be denied.

II. Petitioner alleges no injury in fact where the Sixth Circuit decision does not alter the present posture of this case and where the State was not prejudiced because Thompson's execution had already been stayed by the district court and further district court proceedings were already under way when the Sixth Circuit decision issued

The alleged controversy is merely academic because the Sixth Circuit's opinion is not the cause of Petitioner's alleged injury. Petitioner declares, "the State marshalled [sic] the full force of its judicial machinery in what should have been the final step toward [Thompson's] execution" but was "frustrate[d]" in its efforts by the Sixth Circuit. (Petition p.27-28 *see also* p.16 "the State's efforts to carry out its sentence were suddenly blocked when the Sixth Circuit withdrew it previous opinion..."). Petitioner neglects the fact that it initiated state court proceedings despite the pending Sixth

Circuit proceeding. Petitioner also ignores the fact that two days before the Sixth Circuit's action, the District Court for the Eastern District of Tennessee entered a stay of execution (App.1).[13] The district court also ordered proceedings on the newly-ripe *Ford* claim[14] in Thompson's habeas petition. The district court's stay of execution is to remain for the duration of the *Ford* proceedings and "remain in place upon issuance of an order granting the writ" (App.1). The State did not object to, or attempt to appeal, the district court's order. Accordingly, the State's efforts to execute Thompson were not "suddenly blocked" by the Sixth Circuit. The State's injury, if any, resulted from the stay of execution previously entered by the district court and that complaint is not presented in the petition.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), this Court, through Justice Scalia, summarized the law defining constitutional standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, [citations omitted], (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" [citations omitted] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."

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[13]Counsel have a "duty to inform the Court" of facts that may raise a question as to justiciability of the case. *Bd. of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) *quoting Fusari v. Steinberg*, 419 U.S. 379, 391 (1975); *accord, Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). Although Petitioner briefly noted that the district court was the first to stop Thompson's execution (petition p.6), the district court's order was not included in Petitioner's appendix nor was it again mentioned.

[14]*Ford v. Wainwright*, 477 U.S. 399, 409 (1986)(the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane).

> [citation omitted] Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [citation omitted]

See also Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982)(dismissing an appeal where the appellant was "without standing to invoke our jurisdiction" to seek review of a decision that had no concrete impact on it). "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998).[15] The case-or-controversy requirement is lacking here.

The entry of a 180-day stay of execution by the Sixth Circuit had no causal connection to the State's alleged injury regarding its "reliance" upon "apparent" finality in order to execute Thompson. Nor did the stay have a concrete impact on the State's effort to execute Thompson. The State had already been ordered by the district court not to execute Thompson. Regardless of whether the Sixth Circuit acted, Thompson's execution would currently be stayed and proceedings would be underway in the district court. The State has not been injured and therefore the petition should be denied.

Additionally, Petitioner is merely appealing the order remanding for further proceedings. The Court's exercise of certiorari jurisdiction is "to be exercised sparingly .... And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The lack of finality in the federal proceedings below may furnish "sufficient ground for the denial of the application." *Id.* Petitioner raises the specter that the Sixth Circuit's remand "for

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[15]The party invoking federal jurisdiction bears the burden of establishing its existence. *Id.*

proceedings not inconsistent with this opinion," (petition, p. 29), might cause "confusion" in the District Court (petition p.29-30). But "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). This Court concerns itself with only present, real controversies:

> Such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide," *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of evidence that this is a prospect of immediacy and reality. [citations omitted]

Bd. of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238, 240 (1985). Petitioner's speculation that there might be confusion does not warrant the expenditure of this Court's time when this issue, if it exists at all, may be addressed by the courts below.

Another fact neglected by Petitioner is that the State has taken advantage of the Sixth Circuit's stay of the mandate by initiating a motion with that court which, even today, remains pending. Relying on the fact that the Sixth Circuit retained jurisdiction pending Thompson's petition for writ of certiorari (App.347), the State moved the Court of Appeals to reconsider an order that had been issued almost a year previously.[16] The pendency of that motion gave cause for the Sixth Circuit to not immediately issue the mandate. The State's motion is still pending in the Sixth Circuit. *Thompson*, 373 F.3d at 726 n.12. Additionally, since issuance of the Sixth Circuit's June 2004 opinion, Petitioner has requested and obtained two stays of the Sixth Circuit's mandate. Clearly, Petitioner has benefitted from the Sixth Circuit's stay of its mandate by invoking the

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[16]On July 26, 2002, the Sixth Circuit expanded the scope of undersigned's representation of Thompson to include state court proceedings. At that time, the State was defending the conservatorship of Thompson and attempting to remove Thompson's counsel from representing his interests in proceedings to terminate the conservatorship with its forced medication provision.

same procedure as Thompson; a procedure of which it cannot now be heard to complain.

Because this "Court will not pass upon the validity of a [rule] upon complaint of one who fails to show that he is injured by its operation," nor will the Court "pass upon the constitutionality of a [rule] at the instance of one who has availed himself of its benefits," *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 348 (1936) (Brandeis, J., concurring), the petition should be denied.

III. The United States Court of Appeals for the Sixth Circuit can *sua sponte* reconsider its decision prior to the issuance of the mandate.

A court of appeals retains jurisdiction over a case until the mandate issues. *The Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-52 (6th Cir. 1999); *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281 (1st Cir. 1993). Here, because the Sixth Circuit had not issued the mandate the case remained open. *See Ostrer v. United States*, 574 F.2d 594, 598 (2d Cir. 1978)("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came."). Accordingly, before issuance of the mandate, the Sixth Circuit had discretion to conduct a *sua sponte* rehearing and correct an injustice resulting from its initial decision. *Hemstreet v. Greiner*, 378 F.3d 265, 269 (2d Cir. 2004)("We have the authority to reconsider a decision *sua sponte* ... particularly where we are faced with extraordinary circumstances and the realization that injustice would ensue.")(citation omitted); *Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004)("The mandate of the court has not yet issued in this case, and therefore, we may, at our discretion, 'amend what we previously decided to make it

conform' to the facts of the case ... without need of finding that the case presents the sort of 'grave, unforeseen contingencies,' which would be necessary to recall a mandate that had already issued.") *quoting, Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) *and, Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989)("where the mandate has not issued the availability of appeal has not yet been exhuasted."). This is exactly what occurred in the instant case where the Sixth Circuit expressly noted, "we rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case." *Thompson*, 373 F.3d at 691.

The Sixth Circuit's decision resulted from a *sua sponte* rehearing of the case. There is no question that the court's action was legitimate. The inherent authority of an appellate court to conduct a rehearing *sua sponte* is well established. *See e.g., Bagley v. Byrd*, 534 U.S. 1301-1302 (2001)(*en banc* court of appeals *sua sponte* reheard and remanded the case); *Ellsworth v. Warden*, 333 F.3d 1, 3 (1st Cir. 2003)(concerned with the precedential effect of ... the panel's rulings, the *en banc* court granted rehearing *sua sponte*); *Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997)("It is well-established that a court of appeals is entitled both to reconsider a prior decision *sua sponte* ... and to order a rehearing *sua sponte*."); *United States v. Briggs*, 939 F.2d 222, 223 (5th Cir. 1991)("we *sua sponte* grant rehearing and withdraw our prior opinion in this case ... substituting the following..."); *Krimmel v. Hopkins*, 56 F.3d 873, 874 (8th Cir. 1995)("because of a concern with the disposition, we vacated that opinion and *sua sponte* ordered a rehearing by the panel"); *Cooper v. Woodford*, 358 F.3d 1117, 1118

(9th Cir. 2004)(although a petition for rehearing is statutorily prohibited, the court has "*sua sponte* power to rehear"); *United States v. Springfield*, 337 F.3d 1175, 1176 (10th Cir. 2003)(panel *sua sponte* vacated its order and substituted it with another order). Therefore, this case represents the situation where a Court of Appeals recognizes both its inherent power and the rule of law and applies each to the unique circumstances of the case before it.

The Sixth Circuit acknowledged *Calderon v. Thompson*, 523 U.S. 538 (1998), and applied it to the different circumstances of this case. *Thompson*, 373 F.3d at 691. The facts place this case squarely within that category of cases which are <u>not</u> governed by the rule in *Calderon*. For example, *Calderon* distinguishes cases where the mandate has not issued for reasons independent of the certiorari petition:

> We should be clear about the circumstances we address in this case. ... This is also not a case of fraud upon the court, calling into question the very legitimacy of the judgment. [citation omitted] Nor is this a case where the mandate is stayed under Federal Rules of Appellate Procedure 41 pending the court's disposition of a suggestion for rehearing en banc.

Calderon, 523 U.S. at 557. In this case, the mandate had not issued for reasons independent of Thompson's certiorari petition.

First, pending before the Sixth Circuit has been Petitioner's motion of August 19, 2003 (App.223). Taking advantage of the fact that the mandate in this case was stayed, Petitioner moved the court to reconsider an order entered on July 26, 2002, wherein the court expanded undersigned counsel's representation to include state court proceedings (App.235). This was important because of the then-pending conservatorship proceedings in state court and because of the obvious need for *Ford*

proceedings should an execution date be set for Thompson.[17] A year after entry of the order, Petitioner moved the Sixth Circuit to restrict counsel's ability to represent Thompson. Thompson opposed this motion (App 237). This administrative issue of the Court of Appeals is the subject of the currently pending *en banc* rehearing in the case of *House v. Bell*, no. 00-6136 (r'hrg. filed 6/24/03). As such, the three-judge panel is awaiting the *en banc* court's decision in *House* and has yet to rule on Petitioner's motion. The Sixth Circuit properly did not issue the mandate given the fact that there is an outstanding matter because "the mandate brings proceedings in a case ... to a close and [] remove[s] it from the [court's] jurisdiction". *The Youghiogheny & Ohio Coal Co.*, *supra*.

Second, the mandate had not issued because the court was undertaking a *sua sponte* rehearing of the case. The fact that the court did not issue a formal order to this effect is of no moment. In *Sparks v. Duval Ranch Company*, 604 F.2d 976, 979 (5th Cir. 1979), the Fifth Circuit Court of Appeals considered the effect of FED.R.APP.PRO. 41 on the court's ability to reconsider a decision:

> Finally, it is asserted that the court somehow lost jurisdiction to hear the cause en banc when no motions for rehearing were filed to the panel and the 21-day period specified for issuance of the mandate by Rule 41, Federal Rules of Appellate Procedure, passed. Even cast in its worst light, that the court lay under a duty imposed by the "shall" language of Rule 41 to issue mandate within that time span, we do not think a failure to perform that duty punctually would deprive the court of jurisdiction. The rule grants us power to shorten or enlarge the specified period [for issuing the mandate] by order. This we did by instructions to the clerk to withhold issuance of the mandate. There is no requirement in the rule that such an order be formal, written, or that the parties be given notice of it, though

[17]Tennessee's procedure for determining competency to be executed is set forth in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

> this might be desirable. And even had there been no order, our jurisdiction would not have been affected...

See also United States v. Rivera, 844 F.2d 916, 921 (2d Cir. 1988)("Because issuance of the mandate is an event of considerable institutional significance ... we are unable to say, ... that the mandate 'issued' simply because it should have been issued, or ... because the statute commands it to issue."); FED. R. APP. PRO. Rule 41(c)(a mandate is effective upon issuance). Because the Sixth Circuit mandate did not issue for reasons independent of the certiorari petition, *Calderon* is not controlling and the court had the power to extend the stay of the mandate and conduct a *sua sponte* rehearing. FED. R. APP. PRO. RULE 41(b)(a court may extend a stay of the mandate).

The circuit courts of appeal are in agreement that intervening Supreme Court proceedings do not impede a court of appeals' ability to reconsider its decision if the mandate was stayed prior to receipt of the order concluding certiorari proceedings. In *First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995), under similar circumstances as presented here, the Fifth Circuit vacated its prior opinion and substituted a new opinion, after this Court denied certiorari. The Court of Appeals rejected the argument that, because the mandate should have issued pursuant to Federal Rules of Appellate Procedure 41, the standards for recall of the mandate had to be met. The Fifth Circuit explained that prior to the denial of certiorari, it stayed the mandate for an independent reason (to permit an *en banc* poll). *Id.* at 896. The court held that because the stay was in effect for a reason independent of the petition for certiorari and "prior to the receipt of the order [denying certiorari], we retain discretionary control over our mandate." *Id.* at 897-98. *See also Alphin v. Henson*, 552 F.2d 1033, 1034 (4th Cir.

1977)(revisiting a case after certiorari was denied because the mandate had been stayed in order to allow rehearing and prior to the denial of certiorari); *United States v. Fairchild*, 51 F.3d 129, 130 (8th Cir. 1995)(after denial of certiorari, the mandate had not yet issued so the court was able to grant defendant's motion for rehearing); *Bryant v. Ford Motor Co.*, 886 F.2d at 1528-1531 (vacating a prior *en banc* opinion even though certiorari had previously been denied because the issuance of the mandate had been stayed for an independent reason before the order denying certiorari was filed in the circuit court). Because the Sixth Circuit stayed issuance of its mandate for reasons unrelated to the certiorari proceedings and before it received notice that those proceedings were concluded, it retained control over the case and over the mandate.

This case is further distinguished from *Calderon* where the Ninth Circuit had to recall the mandate in order to revisit the case because the mandate had already in fact been issued. This implicated "'the profound interests in repose' attaching to the mandate" upon its issuance. *Calderon*, 523 U.S. at 550 (citation omitted). Here, in accordance with its inherent equitable authority, the Sixth Circuit engaged in a *sua sponte* rehearing of its decision before the issuance of the mandate.

Also, in *Calderon*, a divided *en banc* panel of the Ninth Circuit *sua sponte* recalled the mandate, reconsidered the opinion and reversed, 7-4, the three-judge panel's unanimous decision. *Calderon*, 523 U.S. at 546-547. Essentially, the *en banc* court engaged in disputed procedures to overturn the unanimous panel decision. In this case, the original panel corrected its own decision. Initially, there was a three-way split in the panel resulting in a 2-1 affirmance of the district court's judgment, with each

judge authoring an opinion. It was the same three judges who unanimously agreed to *sua sponte* reconsider the case. Upon this *sua sponte* rehearing, the three judges united and unanimously agreed to vacate the district court's judgment. As stated by the panel itself, it conducted a review of the case to determine

> whether our prior ruling was mistaken, because there is, and was, in fact available proof that Thompson was suffering from a serious mental disease or defect at the time of the 1985 offense which would have substantially impaired his ability to conform his conduct to the requirements of the law.

Thompson, 373 F.3d at 693. Finding their prior ruling to be based upon a significant mistake, the panel corrected itself.

Another fact which distinguishes this case from *Calderon* is timing. In *Calderon*, the Ninth Circuit's actions occurred just two days before the scheduled execution which implicated a heightened state interest in finality. *Calderon*, 523 U.S. at 548. Here, the execution date had already been stayed by the district court when the Sixth Circuit issued its opinion. Accordingly, the Sixth Circuit's actions, unlike the Ninth Circuit's in *Calderon*, did not disrupt the State's execution efforts and therefore do not require the intervention of this Court.

The Sixth Circuit conducted a *sua sponte* rehearing of the case, rather than a recall of the mandate. The facts of this case place it outside of the rule in *Calderon*. Nonetheless, should this Court determine the Court of Appeals' action was more akin to the Ninth Circuit's recall of the mandate in *Calderon*, the alternative holding of Judge Suhrheinrich also places this case outside the rule in *Calderon*. The concurring/ dissenting opinion, penned by Judge Suhrheinrich, adequately sets forth the facts

supporting a finding of fraud upon the court. *Thompson*, 373 F.3d at 690. Judge Suhrheinrich's opinion is an appropriate alternative basis supporting the Sixth Circuit's conclusions. *Calderon*, 523 U.S. at 557 (fraud on the court is an exception to the rule). For these reasons the petition should be denied.

IV. The United States Court of Appeals for the Sixth Circuit permissibly exercised its inherent equitable power to supplement the record on appeal

The question presented in the Sixth Circuit's opinion is whether that court has the power to supplement the record on appeal:

> The majority opinion holds that we can exercise our inherent equitable power to supplement the record on appeal. Here, I agree...

Thompson, 373 F.3d at 742 (Suhrheinrich, J., concurring). The Court of Appeals recognized the rule of law that "[o]rdinarily, a court of appeals should only consider evidence made part of the district court record." *Id.* at 689. The court also noted FED. R. APP. PRO. 10(e) is a recognized exception to this rule. *Id.* Finally, the court recognized its own exception to this rule based upon its inherent equitable power to pursue the interests of justice. *Id. citing Prather v. Rees*, 822 F.2d 1418, 1420 n.1 (6th Cir. 1987); *Adams v. Holland*, 324 F.3d 838 (6th Cir. 2003) *rev'd on other grounds*, *Holland v. Jackson*, 542 U.S. ___, 124 S.Ct. 2736 (2004). Agreeing with the overwhelming majority of circuit courts of appeal and commentators alike,[18] the three-

[18] *United States v Aulet*, 618 F.2d 182, 187 (2d Cir. 1980); *In re Capital Cities/ABC, Inc.'s Appl. for Access to Sealed Trs.*, 913 F.2d 89, 97 (3d Cir. 1990); *United States v. McBride*, No. 04-6019, 101 Fed. Appx. 921, 922 (4th Cir. July 1, 2004)(unreported)(granting motion to expand the record on appeal); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984); *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993)("When the interests of justice demand it, an appellate court may order the record of a case enlarged."); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970); *Mutch v. Morgan*, No. 01-35820, 71 Fed. Appx. 640 n.1 (9th Cir. July 24, 2003)(unreported)(granting motion to expand the record on appeal and remanding for district court to consider evidence); *United States v. Musgrove*, No. 99-10340, 2000 U.S. App. LEXIS 12591 n.3 (9th Cir. June 5, 2000)(unreported)(granting government's motion to expand the record on appeal to include subsequent mental health evaluations); *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Dickerson v. Alabama*, 667 F.2d 1364, 1367-68 & n.5 (11th Cir. 1982)("...it is clear that the authority to do so exists" based upon "this Court's inherent equitable powers to supplement the record."); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986); *Gatewood v. United States*, 93 U.S. App. D.C. 226, 209 F.2d 789, 792-93 & n.5 (D.C.Cir. 1953); Charles Alan Wright et al., *Federal Practice & Procedure* § 3956.4, at 349-51 (3d ed. 1999 & Supp. 2003); 20 *Moore's Federal Practice*, § 310.10[5][f], at 310-19 (3d ed. 2000).

judge panel unanimously held that "the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal," *Thompson*, 373 F.3d at 691, and "the interests of justice require" such equitable action. *Id.* at 690. The court proceeded to review "the entire certified record," *id.* at 692, vacate the district court's grant of summary judgment to Petitioner and remand the case for further proceedings not inconsistent with its opinion. *Id.*

Petitioner ignores the holding in the instant case that, under limited circumstances, the court may exercise its inherent equitable power to supplement the record on appeal. Instead, Petitioner criticizes the Court of Appeals for "fail[ing] to perceive its action," not as expressly stated in its opinion, but in the manner interpreted by Petitioner (petition p.25). Petitioner also fails to reconcile the court's actual holding with the series of hypotheses and inferences the petition sets forth to re-package the Sixth Circuit's action under AEDPA's successor provisions, 28 U.S.C. §2244(b).

In order to reach the successor question grafted onto this case by Petitioner, this Court would have to find (a) expansion of the record by a court of appeals prior to the issuance of the mandate is the equivalent of a second or successive petition by a

habeas petitioner, *see* petition p.22, (b) 28 U.S.C. §2244(b)(1) automatically governs this expanded record, *see* petition p.22-23, (c) if a court of appeals does not issue the mandate there can be a *de facto* issuance and a *de facto* recall, (d) a court of appeals' *sua sponte* reconsideration of its decision before the mandate issues is always equivalent to a recall of the mandate, *see* petition p.23, and (e) a court of appeals does not have the power to correct a mistaken ruling prior to the issuance of the mandate. *Compare Thompson*, 373 F.3d at 692-693 (Suhrheinrich, J., concurring)("As a result of my review of the entire certified record, I feel that it is incumbent upon me, as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling and issue this opinion."). Accordingly, to reach the issues posed by Petitioner, this Court would have to address a series of questions all centered around the federal courts' inherent "power over [their] own judgments." *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957).

This case, which presents a straight-forward application of a court of appeals' inherent equitable authority to expand the record on appeal, is not the proper vehicle for such machinations. The fact that Petitioner must arrange so many hoops for this Court to jump through to reach the issues suggested in the petition highlights the distinguishable and unique factual circumstances of this case, circumstances which are unlikely to be repeated. For these reasons, the petition should be denied.

V. Under the circumstances of this case, 28 U.S.C. §2254(e)(2) is not triggered because the state courts were presented with the evidence considered by the Sixth Circuit Court of Appeals. Nevertheless, the Sixth Circuit substantially complied with §2254(e)(2).

Petitioner's statement that Dr. Sultan's deposition has not previously been

presented to the state courts (petition p.28) is factually incorrect. The state courts were presented with Dr. Sultan's report and deposition, as well as information regarding the State-initiated conservatorship proceedings. Thompson's state *coram nobis* petition and reply expressly argued Thompson was denied effective assistance of counsel and expert assistance during his state court proceedings.[19] The state trial court noted that "Petitioner [Thompson] has attached several mental health expert affidavits in support of his Petition," one which was from Dr. Sultan, but made the erroneous finding that they "all ... had been obtained for use either at his murder trial or at his previous post-conviction trial proceedings." (App.197). Thompson was denied *coram nobis* relief. The Tennessee appellate courts did not disturb the trial court's ruling. (App.199, 205) . Because Thompson presented the state courts with identical facts and constitutional claim at issue in this case, §2254(e)(2) is not triggered.[20]

Thompson's Sixth Circuit briefs extensively argued that he did not fail to develop claims in the state courts because he was denied funding for a mental health expert to conduct a full evaluation and render an ultimate opinion, because of prosecutorial interference and because the state appellate courts erroneously penalized Thompson for not presenting an expert opinion and retroactively applied procedural rules to Thompson's prejudice in order to avoid reviewing the post-conviction trial court's decision to deny expert funding (App.258-272, App.273-289). For these reasons,

---

[19]Argument regarding denial of effective assistance of trial counsel is contained at App.11-15 and denial of expert services at post-conviction is contain at App.29,32.

[20]Because the state courts made no factual findings with regards to the merit or weight of the facts or legal issue, 28 U.S.C. §2254(e)(1) is also inapplicable.

Thompson did not fail to develop proof regarding his mental state at the time of the crime.

The Sixth Circuit's January 9, 2003, opinion originally "assumed" (without deciding) Thompson "did not 'fail to develop' these claims below," *Thompson*, 315 F.3d at 594-595. In the opinion at issue, the court substantially complied with §2254(e)(2) when it found the state appellate court unreasonably decided the merits of the *Strickland* claim because Thompson was denied the tools required to prove his claim:

> In light of Dr. Blair's post-conviction testimony that a full history was needed to determine whether Thompson was schizophrenic at the time of the offense, the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under *28 U.S.C. § 2254(d)(1)*.

Thompson, 373 F.3d at 729. Even without an express reference to §2254(e)(2), the court clearly adopted Thompson's argument regarding §2254(e)(2) and set forth a legitimate basis (denial of funding) to find that Thompson did not fail to develop facts about his mental health at the time of the crime.

These facts distinguish this case from *Holland v. Jackson*, 542 U.S. ___, 124 S.Ct. 2736 (2004), decided five days after the Sixth Circuit issued its opinion in this case.[21] Moreover, with the advent of *Holland v. Jackson* directing federal courts to expressly set forth an analysis under §2254(e)(2), the issue regarding substantial compliance with §2254(e)(2) is unlikely to recur. Accordingly, the petition should be denied.

---

[21]Remand pursuant to *Holland v. Jackson* is unnecessary because the Sixth Circuit expressly found facts supporting a §2254(e) analysis. A remand would, therefore, not produce a different result.

CONCLUSION

WHEREFORE, based upon the above stated reasons Thompson respectfully requests this court to deny the petition.

Respectfully submitted,

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EDITOR'S NOTE

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(2)

Supreme Court, U.S.
FILED
NOV 18 2004
OFFICE OF THE CLERK

No. 04-514

In the Supreme Court of the United States

RICKY BELL, WARDEN
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDICES TO RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of record for Respondent

APPENDIX

"A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

GREGORY THOMPSON, *Petitioner,* v. RICKY BELL, WARDEN, Riverbend Maximum Security Institution *Respondent.*	)	No. 1:04-cv-177 *Edgar/Shirley*

ORDER

Petitioner Gregory Thompson ("Thompson" or "Petitioner") was convicted of first degree murder and sentenced to death by the Criminal Court of Coffee County, Tennessee. Petitioner is currently confined at the Riverbend Maximum Security Institute in Nashville, Tennessee. Thompson has filed a petition for writ of habeas corpus and requests an evidentiary hearing on his competency to be executed [Court File No. 1]. Petitioner has also filed a motion for stay of execution [Court File No. 2], based on a claim that he is incompetent to be executed. *See Ford v. Wainwright*, 477 U.S. 399 (1986). Petitioner has paid the $5.00 filing fee.

Pursuant to 28 U.S.C. § 2251, the Court GRANTS a brief stay of Thompson's execution that SHALL expire automatically upon the issuance of an order by this court denying Thompson's petition but that shall remain in place upon the issuance of an order granting Thompson's writ of habeas corpus [Court File No. 2].

The Clerk is DIRECTED to fax an executed copy of this Order to Warden Ricky Bell, Riverbend Maximum Security, Nashville, Tennessee; to the Attorney of General of Tennessee; and Ms. Danna C. Hansen Chavis of the Federal Community Defender Service in Knoxville. The Clerk

is DIRECTED to serve a copy of the entire file in this action by certified mail on the respondent and Attorney General of Tennessee.

It is further ORDERED that Respondent SHALL submit his response within ten (10)days from the date of this order.

The case is referred to the Magistrate Judge for the disposition of all non-dispositive motions.

ENTER:

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

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Docket Text:
ORDER granting a brief stay of Thompson's execution that shall expire automatically upon issuance of an order by this court denying Thompson's
petition but shall remain in place upon issuance of an order granting Thompson's
writ of habeas corpus [2]; and the Respondent shall submit his response within
10 days from the date of this order; case referred to the Magistrate Judge for
the disposition of all non-dispositive motions. Signed by Judge Curtis L Collier
on 6/21/04. (ALR,)

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dana_hansen@fd.org,

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APPENDIX

"B"

IN THE CIRCUIT COURT FOR COFFEE COUNTY
MANCHESTER, TENNESSEE

GREGORY THOMPSON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

Case No: 31,213

FILED

MAY 29 2001

CIRCUIT COURT
COFFEE COUNTY, TN
HEATHER HINDS DUNCAN, CLERK

PETITION FOR WRIT OF *ERROR CORAM NOBIS*

Hearing Requested

Comes now Petitioner, Gregory Thompson, through undersigned counsel pursuant to T.C.A. § 40-26-105 and Burford v. State, 845 S.W.2d 204 (Tenn. 1992), and petitions the Court for a writ of *error coram nobis* granting an evidentiary hearing on his claim of subsequently or newly discovered evidence that, if presented at earlier state proceedings, would have resulted in a different judgment. In support hereof Mr. Thompson shows as follows:

I. The State of Tennessee Recently Acknowledged Mr. Thompson's Long History of Bipolar Disorder and Psychotic Symptoms, Declared Him Incompetent, and Ordered the Appointment of a Conservator.

On January 19, 2001, Dr. Casey C. Arney, a treating mental health professional at the Special Needs Facility of the Tennessee Department of Corrections submitted a sworn recommendation for the appointment of a conservator for Mr. Thompson. Dr. Arney stated:

> ...Mr. Thompson is a 38 year old gentleman with a long history of Bipolar Disorder and psychotic symptoms. He has severe symptoms of mania with racing tangential thoughts, pressured speech, in delusional grandiosity. He becomes severely agitated and hostile at times. He has assaulted staff in the recent past which appears to be related to his mental illness. It has been recommended by the treatment review committee to be treated with involuntarily medication [sic] and have a conservator assigned to him.

> It is my opinion that Mr. Thompson lacks the insight into his illness to make decisions regarding mental health and medical treatment at this time. I believe that a conservator is necessary to make appropriate decisions regarding his care and without such conservatorship, harm is likely to come to Mr. Thompson or others as a result of his mental illness. Mr. Thompson's illness is chronic and fluctuating in nature, therefore extended periods of marked improvement are not expected.

(Competency Evaluation of Greg Thompson by Casey Arney, M.D.; Attachment A).

Acting on Dr. Arney's professional recommendation, Tennessee Attorney General and Reporter, Paul G. Summers, petitioned the State Chancery Court for the appointment of a conservator. Attorney General Summers asserted that Mr. Thompson "is in need of protection and assistance by reason of the illness rendering him presently disabled..." (Petition by Attorney General and Reporter Paul G. Summers For Appointment of Conservator, p. 1; Attachment B). Attorney General Summers requested the Chancery Court find Mr. Thompson "incapable of managing his person ... based upon his present mental condition" (Id. at p. 2) and "in view of the seriousness of the Respondent's [Mr. Thompson's] condition the Court immediately appoint a Guardian ad Litem and expedite these proceedings." (Id. at p. 3).

On April 26, 2001, the Chancery Court for the State of Tennessee, 20th Judicial District, Davidson County, appointed Sherry Goodwin as conservator for Mr. Thompson. (Order of the Court; Attachment C).

II. During Prior State Court Proceedings the State of Tennessee Had Denied Mr. Thompson's Mental Illness and Asserted That Mr. Thompson was Malingering.

During Mr. Thompson's capital trial the deposition of Dr. Watson was introduced into evidence despite defense counsel's objection. Dr. Watson testified that Mr. Thompson was not psychotic and instead was malingering mental illness. (Trial Transcript Vol. 20, p. 153). Dr. Watson further testified that Mr. Thompson "had no mental illness or defect which would render

him harmful to himself or others." (Trial Transcript Vol. 20, p. 169). During closing argument the prosecutors argued that Dr. Watson found

> A malingering or faking of a mental illness. This man [Mr. Thompson] had no mental illness. He has no organicity, he has no brain damage, but he has antisocial behavior - - mean and sorry. That is all that is wrong with Gregory Thompson. There is nothing wrong with him...

(Trial Transcript Vol. 21 at p. 8; see also id. at p. 68 & 73). In rendering its decision on direct appeal, the Tennessee Supreme Court relied upon Dr. Watson's testimony. State v. Thompson, 768 S.W.2d 239, 244, 248-249 (Tenn. 1989).

In opening remarks at the post-conviction evidentiary hearing, the post-conviction trial court listed two issues it deemed "relevant and pertinent"; the ineffective assistance of trial counsel and "the present mental condition and capacity of the petitioner [Mr. Thompson]." (Post-Conviction Transcript Vol. I, p. 3).

During the post-conviction hearing the prosecutor argued that Mr. Thompson did not suffer from psychosis, schizophrenia or bipolar disorder. (Post-Conviction Transcript Vol. II, pp. 223 -248). Instead, the prosecutor argued that Mr. Thompson was malingering mental illness and had "antisocial personality disorder." (Id. at p. 256-257).[1] On appeal the Tennessee Court of Criminal Appeals also relied upon the argument that Mr. Thompson malingered mental illness. Thompson v. State, 958 S.W.2d 156, 166-167 (Tenn.Crim.App. 1997).

Contrary to its position during prior state court proceedings the State of Tennessee has finally acknowledged that Mr. Thompson suffers from a genuine and debilitating mental illness. Mr. Thompson's mental illness is directly related to the offense for which he stands convicted of first-degree murder and under sentence of death. As Dr. Amey states in his affidavit, Mr.

---

[1] In fact, Dr. Watson did not support a finding of "antisocial personality disorder" but instead "adult antisocial behavior." (Trial Transcript Vol. 20, p. 161-162) Dr. Blair explained that "adult antisocial behavior [] is not a personality disorder. It just means, in essence, that someone has broken the law and its very different from having an antisocial personality disorder..." (Post-Conviction Transcript Vol. II, p. 256).

Thompson's assault on staff "is related to his mental illness" and "harm is likely to come to Mr. Thompson or others as a result of his mental illness." (See Attachment A).

III. Evidence Relating to Mr. Thompson's Mental Capacity at the Time of the Offense, Trial, and/or Post-Conviction Proceedings Should Now Be Considered by the State Courts.

This Court should review Mr. Thompson's case in light of the recent evidence of Mr. Thompson's long-standing mental incapacity. The purpose of the writ of *error coram nobis* is to bring to the attention of the court some facts unknown to the court which, if known, would have resulted in a different judgment. State ex rel. Carlson v. State, 219 Tenn. 80, 85-86, 407 S.W.2d 165, 167 (Tenn. 1966). A writ of *error coram nobis* will issue upon a showing by the defendant that he was without fault in failing to present that evidence at the proper time. State v. Mixon, 983 S.W.2d 661, 668 (Tenn. 1999). The writ should issue for Mr. Thompson.

Throughout Mr. Thompson's state court proceedings counsel knew that Mr. Thompson's mental state was the crucial issue. (Trial Transcript Vol. I, p. 38, 120). Mr. Thompson believed he and Ms. McNamara were on the run from the Ku Klux Klan. They fled from Georgia to Tennessee. When Ms. McNamara's relative, with whom they had sought refuge, refused them further lodging, they attempted to return home to Georgia. Without money or transportation, the kidnaping of the victim to obtain her car was understandable. But trial counsel could not understand why the victim had been killed when there were other alternatives and knew that the jury would have the same lingering question. (Post-conviction Transcript Vol. I, p. 134). Indeed Martin Trimble, the foreperson of the jury, later testified at the motion for new trial:

> I have stated, and I believe, that the one fact that was not as developed as I would have thought, out of a case that was as detailed as it was, was his age and those contributing factors that might have led him to turn from a well-rounded young man, I'll say, to the type of person he turned out to be. I am not

> a clinical psychologist or anything, but I believe there might have been more work done in that area; but again, I don't know that it would be an overriding factor. It would be one that might have eased my conscious or made me have a better feeling about what we did. We took that very serious. You do not say to take a man's life without being doggone serious, folks. We did that, and we discussed that at length among ourselves; and the conclusion – and I have to say that I agreed with it – was that he was old enough and had the background to have done better than he did; but I do think that probably more could have been done along that line.

(Motion for New Trial, Vol. I p. 77).

Counsel did request a mental health evaluation of Mr. Thompson. (Trial Technical Record p. 19, Motion for Mental or Psychological Examination; Trial Transcript Vol. I, p. 41). The trial court granted the motion by sending Mr. Thompson to Middle Tennessee Mental Health Institute ("MTMHI"), a state facility, for evaluation. (Trial Technical Record p. 64-65, Motion for Continuance; Trial Technical Record p. 84, Order). At MTMHI Mr. Thompson was given "numerous tests" by what the state described as a "team" of experts. (Trial Transcript Vol. XIX, p. 35, 52; Trial Transcript Vol. XX, p. 157, 176). The team made a joint evaluation to which Dr. Watson, the forensic psychologist, testified.

Counsel also filed a notice of insanity defense. (Trial Transcript, Vol. III p. 162). Counsel questioned the independence of MTMHI's psychiatric evaluation (Trial Transcript, Vol. I, p. 20) and requested their own psychiatrist pursuant to *Ake v. Oklahoma*. (Trial Transcript, Vol. I, p. 111). The request was granted. (Trial Technical Record, p. 234, Order). Despite (a) the court's order approving a psychiatrist to examine Mr. Thompson and assist the defense, (b) the knowledge that the State would have psychiatric and other medical opinions of Mr. Thompson at its disposal, and (c) the *Ake* prescription of a psychiatrist to assist in the defense, counsel used the court-ordered mental health funds to hire Dr. Copple who was not a psychiatrist but an "industrial psychologist" (Trial Transcript Vol. I, p. 119). The effort to hire a psychiatrist simply "was not successful" (Post-conviction Transcript, Vol. II, p. 193). Before hiring the industrial psychologist, counsel had tried to find a particular psychiatrist, but "he had

moved to Idaho" (Post-conviction Transcript, Vol. I, p. 43). Counsel "had a kind of a vague recollection of trying to talk to a couple of psychiatrists in Nashville..." (Id. at 45).

Yet three psychiatrists who had treated Mr. Thompson from 1985, when the trial took place, to 1990 told a very different story than that of the MTMHI team. The treating psychiatrists

> had diagnosed him as either having a bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide on a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him.

(Post-conviction Transcript Vol. II, p. 209-10).

Mr. Thompson was evaluated at MTMHI by the State's team for thirty days. The industrial psychologist, however, analyzed Mr. Thompson for a total of less than eight hours: two sessions lasting three and one-half hours each and two further sessions lasting twenty minutes each. (Trial Transcript, v. 18, p. 123-124, 127).

Trial counsel made an uninformed decision that the guilt-phase case could not be defended. (Post-conviction Transcript, Vol. I, p. 58). Instead, counsel focused on securing witness testimony about Petitioner's good acts and exemplary behavior up through his high school years for presentation at the sentencing phase. (Post-conviction Transcript, Vol. II, p. 192). Admittedly, counsel failed to pursue what they considered "negative" information about Mr. Thompson. Without expert psychiatric assistance counsel failed to understand the significance of such information. Since counsel, being uninformed and untrained on such matters, could not explain Mr. Thompson's drastic change of behavior subsequent to high

school, they offered the jury what information they had. Mr. Thompson's changed behavior remained unexplained.

The defense presented no theory whatever at guilt/innocence and Mr. Thompson was convicted of first-degree murder. At the penalty phase they put on a bizarre, incredible defensive theory – that Mr. Thompson committed a brutal murder out of a need to "nurture." (Trial Transcript, Vol. XVIII, p. 142-143 and Vol. XIX, p. 2-5).

Mr. Thompson's prior head injuries were brought out at the punishment phase: one from an auto accident where he sustained a concussion and required hospitalization (Trial Transcript, Vol. XIX, p. 152) and another from an assault by three men with a hammer or crowbar, opening a wound which required stitches (Trial Transcript, Vol. XVIII, p. 54). Ms. Cajulao testified that directly after suffering the latter injury Mr. Thompson

> would get very paranoid. When we lived together, we had a fern tree growing on the side of the house; and he was constantly chopping the backside of it down. He would tell me when I came home to make sure nobody was standing behind there that might hurt me.

(Id. at p. 56). Without a psychiatrist the defense was unable to explain the significance of these events or even address – much less counter – the state mental health team's conclusion that Mr. Thompson had neither brain damage or "psycho-motor impairment" (Trial Transcript, Vol. XX, p. 156). Predictably, the industrial psychologist, since he was not a medical doctor, had found no evidence of brain damage (Post-conviction Transcript, Vol. II, p. 189).

The industrial psychologist testified only at the sentencing phase. He asserted a belief that Mr. Thompson committed the brutal murder due to a need to "nurture" people – in this case, Ms. MacNamara (Trial Transcript, Vol. XIX, p. 26). Having examined Mr. Thompson, the psychologist testified that "I find in this man a very strong, an unusually strong need for what we call nurturance, to meet the needs of people" (Trial Transcript, Vol. XVIII, p. 141). Of Mr. Thompson's motive in committing the offense, the psychologist reasserted the shattered

defense theory that the murder had been committed due to fear of capture. This theory was incomprehensible even with the industrial psychologist's backing; the need to "nurture" Ms. MacNamara by helping her may have provided some explanation for the taking of the victim's car, and possibly explained the kidnaping of the victim as a means to getting her car, but it provides only a flimsy explanation for the later murder of the victim. Because, in Mr. Trimble's words, "those contributing factors that might have led him [Mr. Thompson] to turn from a well-rounded young man...to the type of person he turned out to be" were not developed, Mr. Thompson was sentenced to death.

During post-conviction proceedings, Mr. Thompson raised an ineffective assistance of counsel claim. Post-conviction counsel repeatedly requested funds for a mental health expert to demonstrate prejudice from trial counsel's deficient performance with respect to the mental health aspects of the case. The prosecutor argued that counsel were not entitled to experts at state expense (Post-conviction Transcript Vol. I, p. 16) and state law did not provide for expert services on post-conviction. Counsel submitted the affidavit of Dr. Gillian Blair who opined that based on existing information Mr.Thompson had shown a deteriorating mental status since 1985, was likely suffering from schizophrenia at the time of the crime, and further expert evaluation was required. (Post-conviction Transcript, Vol. II, p. 199, 219). The post-conviction court denied the requested funding. (Pretrial Hearing, Jan. 16, 1995, p. 6).

Prior to the post-conviction hearing the prosecutor talked to the medical staff at Riverbend and reviewed Mr. Thompson's medical records. Mr. Thompson was taken off his anti-psychotic medication shortly after the prosecutor's visit. At the post-conviction hearing the prosecution argued that since Mr. Thompson was off his medication he was not mentally ill (Post-conviction Transcript, Vol. II, p. 247), and was malingering mental illness. Because Mr. Thompson was denied funding for mental health expert assistance he could not counter the state's position that Mr. Thompson was malingering mental illness nor demonstrate prejudice

from trial counsel's deficient performance. The post-conviction court dismissed the petition and denied relief. Mr. Thompson's post-conviction appeals were denied.

Although Mr. Thompson attempted to litigate his mental health related claims in prior state proceedings a combination of ineffective assistance of trial counsel and the court's denial of expert assistance impaired his abilty to adequately plead and prove his claims. Compounding these errors the prosecution actively denied that Mr. Thompson was mentally ill and misrepresented the Riverbend medical records which documented his illness. The State of Tennessee now acknowledges Mr. Thompson's severe mental illness and incompetence. Dr. Arney's competency evaluation affidavit clearly states that Mr. Thompson's illness has been long-standing and presents a danger to himself or others. This was the explanation for the crime which trial counsel and the jury had been seeking. Mr. Thompson's case should now be reviewed in light of this new evidence.

Although T.C.A. § 27-7-103 provides a statute of limitation requiring a petition for writ of *error coram nobis* to be filed within one year of the date the judgment becomes final, to apply the statute of limitations in this context would be unconstitutional in this case. Burford v. State, 845 S.W.2d 204 (Tenn. 1992). In Burford, the Tennessee Supreme Court held that a statute of limitation may be unconstitutional as applied:

> Although we have determined that the statute is constitutional, it is possible that under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided.

Burford, 845 S.W.2d at 208; citing Michel v. Louisiana, 350 U.S. 95 (1955). The Court has directed that the application of Tennessee's statute of limitations must comport with due process. Burford v. State, 845 S.W.2d 204 (Tenn. 1992). The Court requires that

> before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner... [T]he test is whether the time period provides

> an applicant a reasonable opportunity to have the claimed issue heard and determined.

Burford, id. at 208; see also Workman v. State, No. W2001-00774-SC-R11-PD (Tenn. March 30, 2001). This determination is made on a case-by-case basis by weighing a petitioner's liberty interest in collaterally attacking the constitutional violations occurring during the conviction process against the state's interest in preventing the litigation of stale and fraudulent claims.[2] Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

In order to insure that Tennessee's post-conviction statute of limitations comports with constitutional principles, the Tennessee Supreme Court set forth the following due process rule and analysis:

> due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner's claim when the grounds for relief, whether legal or factual, arise after ... the point at which the limitations periods would normally have begun to run.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995). To determine whether due process prohibits the strict application of the statute of limitations courts must (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising", determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. Id.

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[2] In Burford, the court found the state's interest in the administrative efficiency and economy created by a time bar insufficient to outweigh the petitioner's interest, 845 S.W.2d at 209, holding that "where an alleged infringement of a constitutional right often affects life or liberty, conventional notions of finality associated with civil litigation have less importance and the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the constitution." Id. citing Sanders v. United States, 373 U.S. 1, 8, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); I.N.S. v. Chadha, 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

Following Burford, application of the one year statute of limitation to Mr. Thompson's petition for writ of *error coram nobis* would be unconstitutional as applied. It was only recently that the State of Tennessee acknowledged Mr. Thompson's long-standing mental illness, declared him incompetent and appointed him a conservator. The State of Tennessee has no legitimate interest in creating procedural barriers to review of Mr. Thompson's mental health related claims.[3] See Reynolds v. Berry, 146 F.3d 345, 347(6th Cir. Ky. 1998); Rickman v. Dutton, 864 F.Supp. 686, 706 (M.D.Tenn. 1994) aff'd 131 F.3d 1150 (6th Cir. 1997)(Giglio claim not defaulted because state has no legitimate interest in creating procedural barriers to review of issues involving the state's presentation of false testimony). Mr. Thompson has diligently brought these facts to the attention of the state court. Mr. Thompson is entitled to an evidentiary hearing on this new evidence. See Workman v. State, supra.

WHEREFORE, Mr. Thompson respectfully requests that this Court grant him an evidentiary hearing on his mental health related claims in light of the State's recent concession that Mr. Thompson is incompetent and has long suffered from a debilitating mental illness or grant such other relief as is just and equitable.

[3] Additionally, the State waived the application of a procedural bar defense by withholding the information necessary for Petitioner's claims and asserting that Mr. Thompson was malingering mental illness until long after the statute of limitations had run and after Petitioner's state post-conviction proceedings were completed.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: Dana C Hansen

Dana C. Hansen, B.P.R. # 19098
Asst. Federal Community Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865)637-7979

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing document was mailed to:

Glenn Pruden, Esquire
Office of Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Jennifer Smith, Esquire
Office of Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

this the 23 day of May 2001, by postage prepaid delivery.

Dana C. Hansen

ATTACHMENT

"A"

Richland Creek Psychiatric Associates, LLP
4535 Harding Road
Suite 210
Nashville, Tennessee 37205
Telephone 615-383-0095
Facsimile 615-383-0189
Michelle B. Batte, Practice Manager

Brian R. Swenson, M.D.
Paula S. Nunn, M.D.
Richard E. Rochester, M.D.
Jeri E. Fitzpatrick, M.D.
Johnna C. Shadoin, L.C.S.W.
Casey C. Arney, M.D.
Terry M. Huff, L.C.S.W.
Jack L. Koch, Jr., M.D.
Rebecca J. Roberts, M.D.
Hal C. Schofield, M.D.

January 19, 2001

Kelley Blevins Baker, Staff Counsel
State of Tennessee
Dept. of Corrections
4th Floor
Rachel Jackson Building
26th Avenue North
Nashville, Tennessee 37243

Re: Greg Thompson
TDOC: 108406

Dear Ms. Baker

This letter serves as a physicians recommendation for conservatorship for Greg Thompson. Mr. Thompson is a 38 year old gentleman with a long history of Bipolar Disorder and psychotic symptoms. He has severe symptoms of mania with racing tangential thoughts, pressured speech, in delusional grandiosity. He becomes severely agitated and hostile at times. He has assaulted staff in the recent past which appears to be related to his mental illness. It has been recommended by the treatment review committee to be treated with involuntarily medication and have a conservator assigned to him.

It is my opinion that Mr. Thompson lacks the insight into his illness to make decisions regarding mental health and medical treatment at this time. I believe that a conservator is necessary to make appropriate decisions regarding his care and without such conservatorship, harm is likely to come to Mr. Thompson or others as a result of his mental illness. Mr. Thompson's illness is chronic and fluctuating in nature, therefore extended periods of marked improvement are not expected.

Sincerely,

Casey C. Arney, M.D.

CCA/slr

Sworn before me this 19th day of January, 2001.
Michelle H Batte
Notary Public
1/24/05

TENNESSEE DEPARTMENT OF CORRECTION
MENTAL HEALTH TREATMENT REVIEW COMMITTEE

INMATE NAME Thompson, Greg NUMBER 108406 DATE OF BIRTH 12/13/61 SEX MALE

I. REPORT OF INITIAL PHYSICIAN MEETING WITH INMATE:

Initial Physician's Recommendation(s):
Pt. w/ hx bipolar disorder becomes severely psychotic and violent at times with poor insight into illness. Please send for conservatorship and involuntary meds.

Inmate's Signature — Date

Physician's Signature — 1/5/01 Date

II. REPORT OF SECOND PHYSICIAN'S MEETING WITH INMATE:

Second Physician's Recommendation(s):
Recommendation is for involuntary medication and conservatorship.

Second Physician's Signature — 1-8-01 Date

III. REPORT OF TREATMENT TEAM MEETING:

Treatment Team Recommendation(s):

Signature(s) of Treatment Team Member(s):	Dates	Comments
Title		
Title		
Title		
Title		

RC expires 03-17-01
after requesting conservatorship meds to be drafted

RDA-1458
TB-3329 (5/89)
Page 1 of 2 pages

Thompson 108406

MENTAL HEALTH TREATMENT REVIEW COMMITTEE

IV. REPORT OF TREATMENT REVIEW COMMITTEE:

Treatment Review Committee Recommendation(s): TRC was asked to re-evaluate this pt for determination of his competence to give informed consent and the need for a conservator. At this time he is very confused about his illness and the kind of treatment he needs. He is actively psychotic, although less psychotic than when previously evaluated. It is our conclusion and recommendation that he is in need of psychiatric medication that needs to be given involuntarily. Finally, a conservator is recommend.

Signature of Treatment Review Committee:	Dates:	Comment(s):
Lawrence J Haines, PhD Title	1/8/01	
M Roberts - MD. Title	1-8-01	
Title		

INMATE RIGHTS ADVOCATE COMMENT(S):

Pt. cooperative. Pt rights were violated.

Cathy A DeKuba: BA CC HP KQIC 01-08-01
Inmate Rights Advocate Signature — Date

White Copy: Health Record
Yellow Copy: Treatment Team Coordinator
Pink Copy: Inmate Rights Advocate

CDC-3329 (5/89)
Page 2 of 2 pages

RDA-1458

ATTACHMENT

"B"

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

PART IV

RECEIVED
MAR 14 2008
CIVIL RIGHTS AND CLAIMS DIV
ATTORNEY GENERAL'S OFFICE

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION,
Petitioner,

v.

IN THE MATTER OF
GREG THOMPSON, #108406,
Respondent.

NO. 01-1041-IV

FILED
2008 APR -3 PM 3:27
KEITH S. HOLLIS
CHANCERY CLERK
D.C.

PETITION FOR APPOINTMENT OF CONSERVATOR

Comes now the Petitioner, the Tennessee Department of Correction, by and through the Office of the Attorney General and Reporter for the State of Tennessee, and respectfully states as follows:

1. The Respondent, Greg Thompson is a thirty-nine (39) year old male presently incarcerated at Lois DeBerry Special Needs Facility, 7575 Cockrill Bend Industrial Road, Nashville, Tennessee 37209-1057. He is sentenced to death for first degree murder.

2. The Respondent is in need of protection and assistance by reason of the illness rendering him presently disabled as defined in T.C.A. Section 34-11-101(7).

The Respondent has been diagnosed by Dr. Casey Arney, his treating psychiatrist, as suffering from a long history of Bipolar Disorder and psychotic symptoms.

The Respondent is unable to understand the need for treatment with psychotropic medication or the correlation between the medication and the cessation of his symptoms. He has little understanding of how his medication works, and minimal insight into the presence of his illness.

It is the opinion of Dr. Casey Arney, his treating psychiatrist, that the Respondent is incapable of making rational decisions regarding his treatment needs and is in need of a conservator to monitor his medical and psychiatric treatment.

APPENDIX

"C"

IN THE CIRCUIT COURT FOR COFFEE COUNTY
MANCHESTER, TENNESSEE

GREGORY THOMPSON,	)	
	)	
Petitioner,	)	
	)	Case No: 31,213
vs.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

REPLY TO RESPONSE TO PETITION FOR WRIT OF *ERROR CORAM NOBIS*

Comes now Petitioner, Gregory Thompson, through undersigned counsel, and files this Reply to Respondent's response to petition for a writ of *error coram nobis*. In support hereof Mr. Thompson shows as follows:

I. Respondent has Overlooked the Evidence Concerning Mr. Thompson's Mental State at the Time of the Offenses.

Respondent initially argues that Mr. Thompson neither alleges nor presents evidence that his mental problems "existed at the time of the crime (January 1, 1985) nor during the trial (August 20 - 22, 1985)." (Response, p. 2-3). Respondent has, however, overlooked both the allegation and evidence of exactly that. These are noted on page 8 of the Petition for Writ of *Error Coram Nobis*. There Mr. Thompson recounts the affidavit of Dr. Gillian Blair, which was submitted as part of the post-conviction proceedings.[1] As the Petition states, in that affidavit Dr. Blair

> opined that based on existing information Mr. Thompson had shown a deteriorating mental status since 1985, *was likely suffering from schizophrenia at the time of the crime*, and further expert evaluation was required. (Post-conviction Transcript, Vol. II, p. 199, 219). The post-conviction court denied the requested funding. (Pretrial Hearing, Jan. 16, 1986, p. 8).

(Petition, p. 8) (emphasis added) see also Affidavit of Dr. Blair; Attachment A. Since Dr. Blair is an expert, her opinion is evidence. See Tenn. R. Evid. 702. One suspects also that this would be Dr. Arney's opinion; in his affidavit Dr. Arney, a state psychiatrist, describes Mr. Thompson as having "a *long history* of Bipolar Disorder and psychotic symptoms." (Competency Evaluation of Greg Thompson by Casey Arney, M.D.; Attachment B) (emphasis added). Additionally, Faye E. Sultan, Ph.D., has reported that "Mr. Thompson was displaying

[1]Dr. Blair's affidavit was submitted in support of a motion for funding of expert assistance. The motion was denied.

significant signs of mental illness from the time he was a small child." (Report of Dr. Faye E. Sultan, Ph.D., Attachment C). Significantly, Dr. Sultan reports that

> Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

Id.; see also Deposition of Dr. Sultan, Attachment D. Dr. Barry Crown, Ph.D., reports that "Mr. Thompson suffers from a major mental disorder/thought disorder, to wit, that he suffers from schizoaffective disorder-bipolar subtype with organic components." (Report of Dr. Barry-Crown, Ph.D., Attachment E). Onset of this disorder typically occurs in early adulthood. Id. Expert opinion clearly indicates that Mr. Thompson suffered from mental illness at the time of the crime. A combination of ineffective assistance of counsel, denial of resources, and state misconduct prevented the jury from learning this critical fact. A hearing is necessary to allow proper resolution of this issue.

In short, contrary to Respondent's assertion, Mr. Thompson presented both an allegation *and* evidence – in the form of expert opinion – that his mental condition existed in 1985 and that it does go to the issue of guilt of first degree murder and sentencing for any crime.

II. Respondent has Mistakenly Described a Claim of Ineffective Assistance of Counsel as one of Denial of Psychiatric Assistance.

Respondent goes on to argue that Mr. Thompson's ineffective assistance of counsel claim lacks merit because he has not shown why a qualified and competent psychiatrist or mental health expert was not hired by trial counsel. (Response, p. 3). Respondent apparently believes that *Mr. Thompson* must explain the actions of an attorney whose performance was, according to Mr. Thompson's claim, constitutionally deficient. This is not the case. The very point of the claim is that trial counsel did not explain – and *could not* satisfactorily explain – why he did not use Mr. Thompson's scarce court-ordered resources to hire a real psychiatrist with medical training, and instead engaged an industrial psychologist whose practice had consisted largely of something so tangential as evaluating the work potential of social security disability claimants.

Also, contrary to Respondent's claim, Mr. Thompson's psychiatric problems have not "been *litigated* at every stage of his criminal trial and post-conviction proceedings." (Response, p. 4) (emphasis added). The issue was *not* litigated at trial; "litigation" is by its very nature

adversarial. See e.g. Davis v. Liberty Mutual Insurance Company, 38 S.W.3d 560, 565 (Tenn. 2001). Mr. Thompson's trial was hardly adversarial on the crucial issue of psychiatric evidence to support a first degree murder charge; according to the competent evidence now presented by Drs. Arney, Blair, Sultan, and Crown, this matter should have been properly raised -- and counsel should have been properly assisted -- by a psychiatrist, rather than an industrial psychologist. Respondent had at its disposal the entire psychiatric staff of Middle Tennessee Mental Health Institute, while counsel's failure to employ a psychiatrist left Mr. Thompson with woefully inadequate assistance with which to counter Respondent.

Nor did the post-conviction proceedings constitute "litigation" in the true sense of the word. Mr. Thompson was denied proper funding for experts who could have evaluated him and testified with precision regarding his mental state at the time of the offenses. Lacking this assistance, Mr. Thompson was unable to prove his claim to the required standard. As important, Dr. Arney's affidavit calls into question Mr. Thompson's competency during post-conviction proceedings; Dr. Arney therein affirms that Mr. Thompson "lacks the insight into his illness to make decisions regarding mental health and medical treatment at the time" and that he has "a long history" of severe mental illness. (Petition, Attachment A, first page). According to the Tennessee Supreme Court this allegation impugns Mr. Thompson's ability to raise any such claim in post-conviction proceedings -- "a petitioner who was incompetent throughout the limitations period would be denied the opportunity to challenge his conviction in a meaningful manner..." Watkins v. State, 903 S.W.2d 302, 305-6 (Tenn. 1995). The Tennessee Supreme Court more recently explained that under its holding in Watkins, "due process requires that some reasonable opportunity to assert those rights be afforded." Seals v. State, 23 S.W.3d 272, 278 (Tenn. 2000). Respondent's allegation that the claim has been litigated at "every step of his criminal trial and post-conviction proceedings" (Response, p. 2) is, therefore, inaccurate. Davis v. Liberty Mutual, 38 S.W.3d at 565.

Moreover, at every step of his criminal trial and post-conviction proceedings the State affirmatively misrepresented Mr. Thompson's mental state. Throughout Mr. Thompson's court proceedings the prosecutor engaged in false and/or misleading questioning and use of reports to argue that Mr. Thompson was competent and not mentally ill. The prosecutor misled Mr. Thompson's judge and jury despite having evidence to the contrary and without revealing such evidence, thereby committing gross misconduct. For example, during Mr. Thompson's post-

conviction proceedings he attempted to prove his claim of ineffective assistance of counsel based on a failure to adequately investigate his mental health. The state argued that Mr. Thompson was not mentally ill, was competent at the time of trial, was presently competent, and was competent to be executed, despite ten years of records to the contrary. Institutional records clearly illustrate Mr. Thompson's "significant history of psychosis requiring multiple medications." (Attachment F) Mr. Thompson's mental health treatment plan contemporary to the post-conviction hearing reveals a diagnosis of schizophrenia with presenting problems of auditory and visual hallucinations and paranoid ideation. (Attachment G) The treatment plan called for pharmacotherapy and psychotherapy. Mr. Thompson had a well-documented history of hallucinations and delusional thinking, such as: believing the guards are devils; seeing and hearing devils, god and women in his cell; hearing voices; believing his cell is contaminated by radioactive electricity; believing the guards are aliens from outer space; displaying bizarre feelings that his idea for the space shuttle was stolen from him; believing the guards were people from his childhood and feeling confused that they could not remember while he could; believing that he wrote songs for Elvis and Michael Jackson; requesting oil to treat his dry stomach and esophagus; reporting that he had fought a war between good and evil and had won, making everybody happy; refusing to bathe and splattering feces and urine over his cell; eating feces; feeling distressed about his health because he had eaten feces; engaging in self-mutilation; and attempting suicide. (Attachment H) Prior to the post-conviction evidentiary hearing, the prosecutor went to Riverbend to talk to staff about Petitioner's behavior and to review the files.[2] Clearly, the State knew that Mr. Thompson was mentally ill, although the prosecutor argued to the contrary.

Records reflect that since his incarceration Mr. Thompson has almost always been on medication. However, no antipsychotic medication was prescribed during the months of February and March, 1998. (Attachment I) The state post-conviction hearing took place March 27 and 28, 1998. The prosecutor argued at the hearing that since Mr. Thompson was off his medication, he was not mentally ill. *See e.g.* Post-conviction Transcript, v. II, p. 247. Dr. Blair testified that a person on the correct dosage of medication can be stable and function very well,

[2]Curiously, Mr. Thompson was taken off his medication shortly after the prosecutor's visit, and was not on medication at the time of his state post-conviction hearing. Not surprisingly, after that hearing, when the residual effect of prior treatment had ended, Mr. Thompson again descended into mania and the State of Tennessee resumed his medication.

however, that person still has the disease. (Post-conviction Transcript, v. II, p. 236). Dr. Blair further testified that she expected the effects of the medication to remain for a period of time after consumption ceased. (Id. at 242). The State presented no evidence to support its contrary allegations.

In April 1996, upon arriving back in Riverbend, Mr. Thompson once again began to display psychotic symptoms. (Attachment J) By the end of April, Mr. Thompson presented with paranoia and it was recommended that he restart the Mellaril which had controlled his mania with psychosis. (Attachment K) Mr. Thompson had been found pacing his cell and was agitated, stating that he had been listening to the radio for the last six years for twenty-four hours a day and now he was radioactive. While at the infirmary observation cell, Mr. Thompson became more agitated and paranoid stating he could feel that the lights were irradiating him. It was noted that Mr. Thompson had become progressively more hypomanic since April. He was sent to the special needs medical unit on an emergency basis. (Attachment L) At special needs medication was prescribed without his consent because he lacked the capacity to make decisions and he was presenting a danger to himself and others. (Attachment M) Because Mr. Thompson had been taken off his medication for the time period surrounding the post-conviction hearing, he had once again entered a manic episode.

Mr. Thompson's descent into mania was predictable based on his medical records. Those records were reviewed by the prosecutor and were known at the time of the post-conviction hearing. However, defense counsel was denied the expert assistance necessary to rebut the prosecution's medically unsound assertions. Had the judge or defense counsel been informed of Mr. Thompson's true mental status, the outcome of the proceeding would have been different. Because the State kept this evidence from the judge and defense counsel, in essence committing fraud on the court, there was no adversarial determination of Mr. Thompson's mental health. The State has now admitted Mr. Thompson's long-standing mental illness and incompetence. This should be considered by the Court.

III. The State's Admission that Mr. Thompson Suffers from a Long-Standing Mental Illness and is Incompetent is "Newly Discovered Evidence" Which Should Be Considered by the Court.

Respondent finally asserts that the *coram nobis* petition is barred by the statute of limitations because, in Respondent's opinion, Dr. Amey's affidavit is not "newly discovered evidence." Case law, however, flatly contradicts the argument that the affidavit is not new

evidence. An admission by an adversarial party or witness that the testimony given at trial could have been untrue can be "newly discovered evidence." See State v. Parchman, 973 S.W.2d 607, 611 (Tenn. Crim. App. 1997). Here, as in Workman v. State, 41 S.W.3d 100 (Tenn. 2001), Mr. Thompson is not at fault for not bringing the evidence earlier, since State witnesses did not previously admit, and in fact denied, the seriousness of his mental state and the "long history" – in Dr. Amey's words – of his psychiatric problems. Workman, 41 S.W.3d at 103. The State has changed its opinion of Mr. Thompson's mental state, as it is now and possibly as it was at the time of the offense. Mr. Thompson is without fault in not presenting this evidence earlier. State v. Mixon, 983 S.W.2d 661, 669 (Tenn. 1999). Additionally, no state court has ever held a full and fair hearing to evaluate the strength of Mr. Thompson's claim – which is now supported by State's admission – with the necessary funding and competent counsel to ensure expert psychiatric opinion and assistance. Id. A hearing is necessary.

In Burford v. State, 845 S.W.2d 204 (Tenn. 1992), the Tennessee Supreme Court ruled that

> before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner... It is possible that under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided.

Burford, 845 S.W.2d at 208. Application of the statute of limitations here will mean that the issue of Mr. Thompson's capacity to commit first degree murder and culpability will never be heard to the extent required by due process. Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

Moreover, in Workman the Court held that

> In our view, the due process considerations discussed in Burford, and more recently in Seals v. State, 23 S.W.3d 272 (Tenn. 2000) and Williams v. State, [44] S.W.3d [464] (Tenn. 2001), released just today, apply with even greater force when the statute of limitations is being applied in a capital case to bar a claim that newly discovered evidence may prove that the defendant is actually innocent of the capital crime of which he was convicted.

Workman, 41 S.W.3d at 102. Although Respondent attempts to distinguish Workman by pointing out that the newly discovered evidence related to "factual innocence" (Response p. 8) a showing of "factual innocence" is not required to grant a hearing. Indeed Mr. Thompson need only show that due process requires his claim be heard. Burford; Sands; supra. Once granted

a hearing, Mr. Thompson then must show that "newly discovered evidence may have resulted in a different judgment"[4] and that he "was without fault" in failing to present the newly discovered evidence" earlier. Workman, 41 S.W.3d at 104 citing T.C.A. §40-26-105; State v. Mixon, 983 S.W.2d 661, 673 n. 17 (Tenn. 1999). If he makes such a showing, Mr. Thompson will be entitled to a new trial. Id.

In short, the statute of limitations would violate due process if applied here. Mr. Thompson's *coram nobis* petition should be heard in full.

WHEREFORE, Mr. Thompson respectfully requests that this Court grant him an evidentiary hearing on his mental-health related claims in light of the State's recent concession that Mr. Thompson is incompetent and has long suffered from a debilitating mental illness or grant such other relief as is just and equitable.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: Dana C. Hansen

Dana C. Hansen, B.P.R. # 19088
Asst. Federal Community Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979

[4]Unlike Workman, at a hearing Mr. Thompson need not meet the vastly burdensome requirements applied to actual innocence claims, *i.e.*, those of Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). While Mr. Workman faces those requirements, which permit relief only in "extraordinary" and "rare" cases, Schlup, 513 U.S. at 321, Mr. Thompson must meet the lesser burden of showing ineffective assistance of counsel. The greater likelihood that Mr. Thompson can meet his burden and obtain relief makes a hearing on the merits all the more imperative.

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing document was mailed to:

Chris Vernon, Esquire
Assistant District Attorney
14th Judicial District
307 S. Woodland
P. O. Box 147
Manchester, TN 37349-0147

C. Michael Layne, Esquire
District Attorney General
14th Judicial District
307 S. Woodland
P. O. Box 147
Manchester, TN 37349-0147

this the 19 day of July, 2001, by postage prepaid delivery.

Dana C. Hansen

ATTACHMENT

"A"

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Comes the Affiant, Dr. Gillian Blair, and affirms under oath the following which is true to the best of my knowledge, information and belief:

1. I am a licensed Psychologist with a private practice in Nashville, Tennessee. My business address is 1500 21st Avenue South, Suite 320, Nashville, Tennessee 37212.

2. I received a Bachelor of Science Degree from the London School of Economics and Political Science, University of London, England in 1983, a Masters Degree in Psychology from Vanderbilt University in 1985, and a Ph.D. from Vanderbilt University in 1988. I have been a licensed Psychologist in the State of Tennessee since 1988.

3. In my professional work, I have been involved with forensic psychology in the capacity of a Psychological Examiner at Middle Tennessee Mental Health Institute from 1987-1988, and as a private practitioner since that time. I have given testimony and have been qualified as an expert to testify in the courts of Tennessee regarding such issues as sanity at the time of the offense; ability to form specific intent, competency to stand trial, and the presence and effect of learning disabilities, in cases in Davidson, Putnam, Williamson, Lawrence, and Shelby Counties.

4. I have been approached by Robert Warner and asked to give an opinion regarding whether or not there is a need for psychological evaluation of his client Gregory Thompson.

5. I have reviewed Mr. Thompson's institutional and medical records at Riverbend Maximum Security Institution where he is currently incarcerated. The records revealed a positive family history for psychiatric disturbance. Extent and diagnoses are unknown. Apparently both parents are deceased, one from a self-inflicted gunshot wound. The medical progress notes revealed Mr. Thompson's escalating psychiatric problems since incarceration. Three psychiatrists (Drs. Brad Diner, Roy Deal, and Steve Humble) employed at RMSI have treated Mr. Thompson

[1]
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for psychosis. Adjustment difficulties were noted in Mr. Thompson during November 1985. In June 1986 a suicide gesture/attempt occurred. By June 1988 Mr. Thompson was diagnosed as exhibiting a Bipolar Disorder. The possibility of a thought disorder was raised in July 1988. By September Dr. Diner reported that Mr. Thompson was psychotic "looks more schizophrenic than manic." Symptoms described included thought blocking, suspiciousness, inappropriate affect, hallucinations and agitation. Mr. Thompson's behavior apparently deteriorated even further. Ideas of self harm were noted in January 1989, along with increased auditory hallucinations and persecutory ideas. By May 1989, hygiene was noted to be poor. In September 1989 Mr. Thompson set fire to his cell and received burns to his face and hands. A month later he was noted to be hostile, and agitated with rapid speech and loosening of associations. His mental status rapidly deteriorated to include flight of ideas, marked tangentiality, grandiose delusions, thought projection, obsessive ideas and paranoia.

6. Since late 1989 the medical record indicated a rapid cycling pattern of psychosis. At times Mr. Thompson has been noted to be withdrawn, morbid and expressing suicidal ideation, if not direct plans. More typically, he has vacillated from a basal mental status that included low level auditory hallucinations, impaired insight and judgment and compromised coherence to a frankly psychotic state. At these times Mr. Thompson appeared agitated, hostile, and uncooperative. Speech was noted to be intrusive, pressured and loud. Thoughts were grandiose and tangential with marked loosening of associations and flight of ideas. Paranoia was evident. The presence of hallucinations (both auditory and visual) were often denied, but low level ongoing auditory hallucinations were suspected by the examining psychiatrist. Mr. Thompson has presented something of a diagnostic dilemma. He has been variously diagnosed as Bipolar Affective Disorder, Schizo-affective Disorder, and Schizophrenia Paranoid type. The possibility of malingering has been raised, however Dr. Humble stated 8/9/90 that such a diagnosis "fails to explain the psychotic symptoms." Current medications are Lithium, Haldol, and Cogentin. Mr. Thompson sporadically refused to take medication as prescribed. It should be noted that Lithium has been prescribed intermittently since 1986. On occasion Mr. Thompson has been secluded and

subdued for the protection of both self and others. The writings of Mr. Thompson are consistent with the above description of a psychotic individual.

6. I have read the affidavit of Brock Mehler of Capital Case Resource Center, with whom I have worked on previous cases, and whose investigations and assessments I have found to be accurate. The brief history of traumatic childhood events and head injuries, and the self-reported symptoms of neurological impairment, sleep disturbance, hallucinations and disordered thinking are consistent with the psychotic behavior noted in the institutional and medical records, and raise an inference that Mr. Thompson's problems may have a neurological as well as psychological basis. A full social and medical history would be an essential part of any assessment of Mr. Thompson's mental condition.

7. The evidence presented suggests that Mr. Thompson is grossly impaired, and it is my professional opinion that he is in need of a full psychological evaluation.

8. If Mr. Thompson is found to be suffering from neurological or psychological impairment as described above, it is likely that some degree of such impairment would have existed at the time of the offense and would have been a significant factor in determining whether or not Mr. Thompson was able to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law when he committed the homicide of which he stands convicted. Such impairment would have had a direct bearing upon whether he was capable of knowingly and intelligently waiving his constitutional rights to counsel and to remain silent at the time of his arrest. It would also have been significant mitigating evidence which should have been considered in the determination of whether a penalty less than death was appropriate in his case.

9. In order to arrive at an adequate understanding of Mr. Thompson's neurological and psychological condition, it would be necessary to administer a full battery of tests and conduct a mental status interview. The psychological tests and interview could be administered at a cost of $850.00. My fee for consultation, and for court testimony, if required, is $100.00 per hour. As noted, a complete social and medical history must be compiled in order to adequately document Mr. Thompson's psychological development, incidents of trauma, and evidence of pre-existing

conditions. The investigation necessary to compile such a history need not necessarily be done by a psychologist, but should be performed by a person skilled in social/psychological investigation.

FURTHER THE AFFIANT SAITH NOT.

Dated: 11/21/90

Gillian Blair

DR. GILLIAN BLAIR, AFFIANT

Sworn to and subscribed before me on this the 21st day of November, 1990.

Janet L. Barton

NOTARY PUBLIC

My Commission Expires: 5/22/93

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ATTACHMENT

"B"

Richland Creek Psychiatric Associates, LLP

4535 Harding Road
Suite 230
Nashville, Tennessee 37205
Telephone 615-383-0095
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Michelle H. Batte, Practice Manager

Brian R. Swenson, M.D.
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Johanna C. Shadoin, L.C.S.W.

Casey C. Arney, M.D.
Terry M. Huff, L.C.S.W.
Jack L. Koch, Jr., M.D.
Rebecca J. Roberts, M.D.
Hal C. Schofield, M.D.

January 19, 2001

Kelley Blevins Baker, Staff Counsel
State of Tennessee
Dept. of Corrections
4th Floor
Rachel Jackson Building
26th Avenue North
Nashville, Tennessee 37243

Re: Greg Thompson
TDOC: 108406

Dear Ms. Baker

This letter serves as a physicians recommendation for conservatorship for Greg Thompson. Mr. Thompson is a 38 year old gentleman with a long history of Bipolar Disorder and psychotic symptoms. He has severe symptoms of mania with racing tangential thoughts, pressured speech, in delusional grandiosity. He becomes severely agitated and hostile at times. He has assaulted staff in the recent past which appears to be related to his mental illness. It has been recommended by the treatment review committee to be treated with involuntarily medication and have a conservator assigned to him.

It is my opinion that Mr. Thompson lacks the insight into his illness to make decisions regarding mental health and medical treatment at this time. I believe that a conservator is necessary to make appropriate decisions regarding his care and without such conservatorship, harm is likely to come to Mr. Thompson or others as a result of his mental illness. Mr. Thompson's illness is chronic and fluctuating in nature, therefore extended periods of marked improvement are not expected.

Sincerely,

Casey C. Arney, M.D.

CCA/slr

Sworn before me this 19th day of January, 2001.

Michelle H Batte
Notary Public
1/24/03

TENNESSEE DEPARTMENT OF CORRECTION
MENTAL HEALTH TREATMENT REVIEW COMMITTEE

INMATE NAME Thompson, Greg NUMBER 108406 DATE OF BIRTH 12/13/61 SEX male

I. REPORT OF INITIAL PHYSICIAN MEETING WITH INMATE:

Initial Physician's Recommendation(s):

Pt. w bipolar disorder becomes severely psychotic and violent at times with poor insight into illness. Please send for conservatorship and involuntary meds.

Inmate's Signature — Date

Physician's Signature — 1/5/01 Date

II. REPORT OF SECOND PHYSICIAN'S MEETING WITH INMATE:

Second Physician's Recommendation(s):

Recommendation is for involuntary medication and conservatorship.

Second Physician's Signature — 1-8-01 Date

III. REPORT OF TREATMENT TEAM MEETING:

Treatment Team Recommendation(s):

Signature(s) of Treatment Team Member(s):	Dates:	Comments:
Title		
Title		
Title		
Title		

TC expires 03-17-01
letter requesting conservatorship needs to be drafted

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Thompson 108406

MENTAL HEALTH TREATMENT REVIEW COMMITTEE

IV. REPORT OF TREATMENT REVIEW COMMITTEE:

Treatment Review Committee Recommendation(s): TRC was asked to re-evaluate this pt for determination of his competence to give informed consent and the need for a conservator. At this time he is very confused about his illness and the ~~form~~ of treatment he needs. He is actively psychotic, although less primative than when previously evaluated. It is our conclusion and recommendation that he is in need of psychiatric medication that needs to be given involuntarily. Finally, a conservator is recommend.

Signature of Treatment Review Committee:	Date:	Comment(s):
Lawrence J Haynes, PhD Title	1/8/01	
M Roberts MD. Title	1-8-01	
Title		

INMATE RIGHTS ADVOCATE COMMENT(S):

N/A - cooperative. No rights were violated.

Cathy A Dickens BA CC HP ICQIC 01-08-01

Inmate Rights Advocate Signature Date

White Copy: Health Record
Yellow Copy: Treatment Team Coordinator
Pink Copy: Inmate Rights Advocate

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Page 2 of 2 pages

RDA-1458

ATTACHMENT

"C"

UNIVERSITY PSYCHOLOGICAL ASSOCIATES, P.A.
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(704)547-1483/Fax (704)547-0052
Faye E. Sultan, Ph.D., Director

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John Brodsky, Ph.D.
David Ostow, Ph.D.
Julie A. Pruitt, Ph.D.
Faye E. Sultan, Ph.D.
Judith Thorne, Psy.D.

Psychological Associates
Ruth E. Kappius, M.A.
Gene Hunt, M.A.

Clinical Social Worker
Laura B. Bell, CCSW

PSYCHOLOGICAL REPORT
CLIENT: GREGORY THOMPSON
DATE OF BIRTH: 12-13-63
DATE OF REPORT: 7-22-99

Location of Examination: Riverbend Maximum Security Institution (RMSI)
Nashville, Tennessee
Education of Client: 13 years
Occupation of Client: Death Row Inmate

REFERRAL QUESTIONS:

Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

1. Mr. Thompson's current psychological status
2. Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.
3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be considered to be mitigating in nature at the time of his trial.

PROCEDURE:

Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr. Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was made to replicate this type of assessment.

Following the 8-20-98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

It was intended that additional clinical observations of Mr. Thompson would continue to be made as part of this evaluation process. A return visit to RMSI was scheduled to occur in early 1999. By January 1999 Mr. Thompson's psychological condition had deteriorated to such a severe extent that observations relevant to the original referral questions became impossible. Mr. Thompson's lawyers now had questions concerning Mr. Thompson's competence to participate in Habeas Corpus proceedings. Two further interviews were conducted with Mr. Thompson for this limited purpose, on 2-2-99 and 4-7-99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

As a consequence of this interruption in the evaluation procedure, the psychological evaluation which was initiated for the purposes described in the REFERRAL QUESTIONS section of this report is, as yet, incomplete. Further interviews with Mr. Thompson will be conducted at a late time. Nevertheless, the extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson's mental state at and around the time of the 1985 offense.

CLINICAL OBSERVATIONS:

Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

FORMAL PSYCHOLOGICAL TESTING:

The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) was administered to Mr. Thompson on 8-20-98. It had been determined in other examination settings that Mr. Thompson's level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

The MMPI-2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid features. There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA CONTAINED IN RECORDS:

The is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of hi his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

INTERVIEWS WITH COLLATERAL WITNESSES:

Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

Ms. Maybelle Lamar

Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she "took to my bed" for approximately five or six weeks following the accident. Ms. Lamar was unable to attend to these children in any way at that time. She did not recall how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

Ms. Lamar described Mr. Thompson as displaying significantly "different" behavior when he returned to visit her following his discharge from the U.S. Navy. "Greg didn't act the same". Unlike the 'eager to please', passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was "angry", "sometimes sad". "I don't think he wanted me to know what was going on with him. He mostly just stayed away from me." Ms. Lamar reported that she noticed Mr. Thompson sometimes "staring off into space" or "talking to himself". She would ask him about these behavior. "He'd deny it. He acted like he didn't know what I was talking about." Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson's trial.

Ms. Nora Jean Hall Wharton

Norma Jean Wharton is Mr. Thompson's older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

Ms. Wharton described Mr.Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the

children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates. Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg "You have the Devil in you." Mr. Thompson would tell his sister that he was attempting to "knock the Devil out" of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a lenthy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and anti-depressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

CUSTODY OFFICERS AT RMSI

Following the second interview conducted with Mr. Thompson on 2-2-99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

MICHAEL CHAVIS

Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2 , 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together for approximately four years, from 1980 to 1984.

Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions proved by Ms. Nora Wharton, Ms. Cajulao reported several episodes of "paranoid" and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were "after" him. He would close all the curtains in the house because he did not want the person who was "looking" for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson's mental state.

SUMMARY AND CONCLUSIONS :

Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background if best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

Faye E. Sultan, Ph.D.

ATTACHMENT

"D"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

GREGORY THOMPSON, Petitioner, v. RICKY BELL, WARDEN Respondent.	Case No. 4:98-CV-6

DEPOSITION OF FAYE E. SULTAN, PH.D.
(Taken by the Respondent)
Charlotte, North Carolina
July 22, 1999

Reported by: Dayna H. Lowe
Court Reporter
Notary Public

COPY

HUSEBY & ASSOCIATES
A[illegible] LEGAL SERVICES COMPANY
[illegible]

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Witness Address:

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Deposition of FAYE E. SULTAN, PH.D., taken by the Respondent, at the Mecklenburg County District Attorney's Office, 700 East Trade Street, Charlotte, North Carolina, on the 22nd day of July, 1999, at 1:01 p.m., before Dayna H. Lowe, Court Reporter and Notary Public.

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PROCEEDINGS

Whereupon,

FAYE E. SULTAN, PH.D.,

having been duly sworn,

was examined and testified as follows:

EXAMINATION BY COUNSEL FOR RESPONDENT

BY MR. PRUDEN:

Q. Would you please state your name for the record.

A. Faye Ellen Sultan.

Q. And what is your profession?

A. I am a clinical psychologist.

Q. Dr. Sultan, where is your practice located?

A. My practice is located right here in Charlotte,

North Carolina.

Q. And are you a sole practitioner in your practice, or are you in partnership of some sort with others?

A. In the last several years, we actually have operated in partnership. I retain the directorship of the practice. It's called University Psychological Associates. I was, for many years, the sole proprietor of that practice. I'm now a shareholder. And there are a total of nine psychologists and social workers practicing together.

Q. Are there any psychiatrists as part of your practice?

A. No, not at this time. There are not.

Q. You're appearing today pursuant to a subpoena that we served on you?

A. Yes, I am.

MR. PRUDEN: I'd like to make the subpoena Exhibit 1, please.

(Exhibit No. 1 was marked for identification.)

BY MR. PRUDEN:

Q. Do you happen to have a CV?

A. I do. It's part of the package that you've just been given.

Q. Oh, okay. Great. This will simplify things.

Dr. Sultan, just to make sure that I've got it straight, is this a copy of your curriculum vitae?

A. It is.

MR. PRUDEN: I would like to make that Exhibit 2 to this deposition, and, with your permission, after you mark it, I'd like to just keep it over here by me for reference.

MR. KISSINGER: No objection.

(Exhibit No. 2 was marked for identification.)

MR. PRUDEN: Off the record for a moment.

(Off-the-record discussion.)

BY MR. PRUDEN:

Q. Now I assume it will tell me somewhere on your CV where you are licensed?

A. I'm licensed in North Carolina.

Q. And only North Carolina, correct?

A. That's correct.

Q. I notice the date on your CV is 19 October 1996.

A. Yes, it is.

Q. Is it correct in all aspects, or are there any additions or deletions that need to be made to it?

A. There are no deletions I don't believe. There are some additions.

Q. Okay.

A. Let me just be sure there are no deletions. No, I think everything stands as is.

In addition, in the last several years there are some presentations. That would be the nature of the additions. I gave a workshop track at the National Conference for Women and Addictions that was held in North Carolina, a national symposium addressing women's and addictions issues and the legal factors that ought to be considered. I did that track. I gave a lecture to the North Carolina Counselors' Association meeting about a year ago.

Q. And the nature of that?

A. That had to do with the appropriate assessment of trauma survivors, I believe, from a counseling perspective, or how a counselor might best interview people in a way that was ethical and effective. And I think those are the two additions.

Q. Okay. Thank you.

A. Sure.

Q. Now in preparation for -- let me strike that. When were you first contacted to possibly work on Mr. Thompson's federal habeas case?

A. I think it was near the end of July of 1998. Perhaps August.

Q. So either July or August of last year?

A. Either the end of July or the beginning of August of 1998.

Q. And who first contacted you?

A. Mr. Chavis did on behalf of Mr. Kissinger for the Federal Defender Services office.

Q. And what was the nature of that first contact? Was it simply to determine your availability to possibly assist in the case?

A. Mr. Chavis asked me about my availability and asked if I would be willing to perform a psychological evaluation to assess what Mr. Thompson's psychological condition might have been like at the time of the offense in 1985, to assess whether it was possible to make such an appraisal, to see whether there were factors in his personal background that might have been investigated at the time of trial that would have had bearing on his psychological status at the time of the offense, and Mr. Chavis also suggested that they wanted to know something about Mr. Thompson's current psychological state, his level of functioning at the present time.

Q. Were you also asked if you would be able to determine his competency at the time of his criminal trial in 1985?

A. That was not an initial question, no.

Q. Was it a subsequent question?

A. It became a question because Mr. Thompson's psychological state deteriorated very, very quickly at a point a few months after my initial meeting with him. At that point, there was a question about whether he would be able to proceed with the psychological evaluation, and I was asked to come and observe him and make some kind of determination about whether he was competent to proceed.

Q. In these habeas proceedings, correct?

A. That's correct.

Q. Did Mr. Chavis express to you any opinion as to what he thought Mr. Thompson's psychological condition was, his mental status was, at the time of the offense?

A. The only opinion that he expressed to me was that he thought that he was not in good shape, that he had deteriorated. He didn't label it in any particular way. Said he didn't think that he was doing as well.

Q. When you say he didn't label it, does that mean he didn't use any diagnostic categories, say out of the DSM-IV?

A. Exactly.

Q. Now after your initial contact with Mr. Chavis, did you accept being retained by them on this case, or did you have subsequent discussions in that regard?

A. I think the next conversation was simply a logistical conversation planning my first trip.

Q. And after the initial series of factors or items that Mr. Chavis detailed for you that they wanted you to assess, was that amended any?

A. I need to ask you to tell me what you mean.

Q. Sure. You said that you were asked to determine Mr. Thompson's mental status at or about the time of the offense, if it was possible to make that appraisal, and then his current competency. Have you been asked subsequent to that to render any other expert opinions in this matter?

A. Only what I said to you just a minute ago in terms of his competence to proceed with the appellate process. I don't think I've yet been asked to assess his competence at the time of the offense. I don't think that's ever been a question.

Q. Do you know how you came to be recommended to the federal public defender in Knoxville to participate in this case?

A. I don't.

Q. Have you ever worked for Mr. Kissinger before?

A. I don't think so. I don't know all of the attorney pairings in the state of Florida for the capital collateral representative. I know that Mr. Kissinger, although I didn't know him then, worked there at some point, and it's possible that he was attached to one of

the cases that I worked on.

Q. How about Ms. Dana Hansen? Have you ever been employed by her?

A. I don't think so.

Q. You said that you have a clinical practice, correct?

A. That's correct.

Q. And you also do forensic work, obviously, since you're here today?

A. Yes.

Q. How much of your practice percentage-wise is forensic work? Can you give me an estimate?

A. At this point in my practice, maybe 20 or 25 percent.

Q. And the balance, 75 to 80 percent, being clinical, is that correct?

A. Yes.

Q. Of your forensic work, can you give me a breakdown, percentage-wise, civil cases versus criminal cases? And when I say "civil," I mean, you know, family law matters, personal injury matters, things of that nature.

A. I think that, along that dichotomy, probably half and half criminal versus civil cases as you've described them. I think that's probably about right.

Q. Now out of the criminal cases, what percentage of the time have you testified for the defense versus the State?

A. A lot of the time when I do an evaluation, either for the State or for the defense, I don't wind up testifying, so it's a little hard to describe it quite that way.

Q. Explain to me basically how that works out for you.

A. Okay. I may be called upon either to supervise an evaluation that goes on in my office by another psychologist on our forensic team. I may be called upon to do an evaluation in a criminal situation. Sometimes what I discover in the evaluation is helpful to the attorney who's asked me to do the evaluation. Often I only know that by whether I'm called to testify later in the case, assuming that there is a trial and there is testimony. Some percentage of cases will come to a settlement arrangement or a plea arrangement. Some percentage of cases, because I'm in a supervisory capacity, I won't wind up testifying at all.

Q. Approximately how many capital cases have you been consulted on in the course of your practice?

A. In the course of my practice. Maybe 75, maybe 80.

Q. And capital cases out of which states?

A. North Carolina, Utah, South Carolina, Florida, Virginia. And I guess this counts as a capital case, even though it's a post-conviction case, right?

Q. That's correct.

A. So Tennessee.

Q. I meant to include collateral cases, either post-conviction or federal habeas among those capital, so does that bring in any other states besides the five that you listed?

A. I don't think so. I think that's all.

Q. Out of the 75 to 80 capital cases where you have been consulted, how many of those, roughly, have you given testimony in court?

A. In total I'm going to say maybe 25 or 30.

Q. And would the testimony that you gave in capital cases be in those five states that you've listed for me, North Carolina, Florida, Utah, South Carolina, and Virginia?

A. I don't think that I've testified in Utah. And I was called to testify in Virginia and then declined to testify, so that I may or may not have a record of appearing as a witness in that state. I'm not sure.

Q. In all the capital cases where you've been consulted, has it been for the State or for the defense?

A. They've all been for the defense.

Q. All for the defense. And so none of them would be like a court-appointed expert? You were perhaps paid through court funds but working for the defense in all those cases? I mean, you weren't like an amicus to the court in any of these?

A. No. In fact, North Carolina doesn't often operate on that kind of system, but most of the payment has come through court funds as you described just a minute ago.

Q. Because most of the defendants were indigent?

A. Yes. That's correct.

Q. Obviously, in the states where you've testified you have been declared an expert, correct?

A. Yes.

Q. What federal jurisdictions have you been declared an expert in?

A. I don't know if I know.

Q. As best you can recall.

A. I think the only federal case that I testified in that fits into the category we're talking about is a North Carolina case, a Charlotte case.

Q. Would that be in the Western District of North Carolina?

A. Sounds right to me.

Q. All right. Now a Dr. Barry Crown has also been retained to work on behalf of Mr. Thompson in this case. Are you familiar with Dr. Crown?

A. I am.

Q. How is it you know of Dr. Crown?

A. I've never met Dr. Crown. I hear that he and I have appeared in the same hallway, although we're excluded from speaking to one another or even knowing one another. I'm not sure what he looks like. But I think there have been several cases, some that I know about and some that I don't, on which he's also been called in to prepare an opinion of some kind.

Q. So you've never directly consulted with Dr. Crown on a capital case?

A. That's not true. We have had probably a total of four, maybe five, telephone conversations where we've talked briefly about some of those cases. I just don't know what other cases there are.

Q. Have you had conversations with Dr. Crown about this case?

A. Yes, I have.

Q. And the nature of those conversations?

A. Because I was doing only a part of the psychological testing, having been told by Mr. Chavis that the neuropsychological and intellectual assessment

would be done by Dr. Crown, I needed to check with Dr. Crown about his test results so that I could include them as part of my opinion, part of my work. In that kind of situation, I have the permission of the attorney to make that kind of consultative phone call, and so we did talk about Mr. Thompson.

Q. Did you provide information to Dr. Crown about your testing and evaluation of Mr. Thompson as well?

A. I did not.

Q. Anything about any diagnoses you may have reached?

A. No. I don't think I provided him with any diagnostic information at all.

Q. Do you know Dr. Theodore Blau?

A. No, I don't.

Q. Do you know of him?

A. Yes.

Q. Obviously, you are a psychologist, you're not a medical doctor, correct?

A. That's correct.

Q. Do you have a law degree, a juris doctor or something else like that?

A. No, I don't.

Q. You're not authorized to prescribe medications, correct?

A. No. In North Carolina, psychologists don't prescribe medications. In some states they do.

Q. As part of your training, have you had any training regarding psychotropic medications and their effects?

A. Yes.

Q. What sort of training is that?

A. I have had both graduate school training about the effects of medications and the various types of medications and postgraduate seminar education about that matter.

Q. Various workshops that you've attended, for example?

A. Yes.

Q. You're not a neurologist, correct?

A. No, I'm not.

Q. What sort of neurological training have you had?

A. Almost none. That's why always in an assessment where a neuropsychological question comes in I will request the assistance of a neuropsychologist.

Q. In performing the evaluations that have been requested of you on Mr. Thompson's behalf, you've reviewed various documents?

A. Yes.

Q. You have provided me with a three-page, approximately three-page document, two and a half pages, of -- says documents reviewed as of 7/22/99?

A. That's correct.

Q. As you sit here today, to the best of your knowledge, this is a complete listing of all the documents that you have reviewed?

A. To the best of my knowledge, every single document that I have reviewed is listed on these three pages.

MR. PRUDEN: If I could, I'd like to make that the next exhibit to the deposition.

MR. KISSINGER: No objection.

(Exhibit No. 3 was marked for identification.)

BY MR. PRUDEN:

Q. Are there any other materials, outside of documents, that you've reviewed as part of your process of evaluating Mr. Thompson, for example, audio tapes, videotapes?

A. No. There are no tapes of any kind relating to this case that I have reviewed. The other material would be my own assessment notes from my clinical interviews with Mr. Thompson, notes that I made during my interviews with collateral witnesses, the psychological testing data that I collected.

Q. Any other materials --
A. I think that's it.
Q. -- that have not been listed as documents? Okay. The clinical notes and notes from your interviews with collateral witnesses and the psychological test data, those are items on the subpoena. Have you already forwarded those materials to Dr. Blau?
MR. KISSINGER: I don't think they have been forwarded as of this very moment, but they will be sent off immediately following the deposition.
MR. PRUDEN: And you'll provide us with an inventory of what's being sent?
MR. KISSINGER: Absolutely.
MR. PRUDEN: Do you have Dr. Blau's address?
MR. KISSINGER: I have it.
(Off-the-record discussion.)
BY MR. PRUDEN:
Q. How many times have you actually seen Mr. Thompson?
A. I've seen him three times.
Q. Can you please tell me when those three times were?
A. I can. The first time I met with him was on August 20th of 1998, and I spent about four hours with him at that time. I then saw him on the 2nd of February,

1999, and spent about two and a half or three hours with him, perhaps almost four hours with him. And again on the 7th of April of 1999 for about an hour, hour and a half.
Q. Let's take these in order. What exactly was the purpose of your visit with Mr. Thompson on the 20th of August, 1998?
A. The purpose of my initial visit was to address the four questions that I mentioned at first, to assess Mr. Thompson's current psychological status, to assess Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense, and to assess social, environmental, psychological, and economic factors in his life that might have been considered to be mitigating in nature at the time of his trial in 1985.
Q. And how did you go about this on the 20th of August, 1998?
A. Prior to that date, I had received some records from the Federal Defender's office, and I reviewed those records to establish that Mr. Thompson had a reading level that was adequate to allow the administration of certain psychological tests. My procedure is, prior to the initial interview, to do very limited record review so that I go into the first interview with an objective

mind. So basically what I knew about him at that point was the crime which he had been convicted of, the date of the offense, and what his educational background and reading level were. I also knew that psychological testing had been administered to him in a variety of settings prior to my going in. At that point, I went in with just the Minnesota Multiphasic Personality Inventory for that first date.

Q. Is that the MMPI-2?

A. Exactly. And I spent two and a half of the four hours with him conducting the clinical interview, and about 90 minutes of that time was spent for Mr. Thompson to self-administer the MMPI following my instructions and direction.

Q. That's in addition to the two-and-a-half-hour interview?

A. That's correct.

Q. And that time again was?

A. About four hours.

Q. I'm sorry. No. For the MMPI.

A. About 90 minutes, about an hour and a half.

Q. What did you assess Mr. Thompson's reading level at prior to going in?

A. I didn't assess his reading level. It had been assessed as above eighth grade, which is the required

reading level for the proper administration of the MMPI-2.

Q. And the notes of the clinical interview on that date are among the materials you'll be forwarding to Dr. Blau, correct?

A. Yes. That's correct.

Q. As well as the raw data of the MMPI?

A. Yes.

Q. Will that raw data indicate what scoring programs you've used on the MMPI?

A. Yes.

Q. Were you able to validly administer an MMPI to Mr. Thompson --

A. Yes, I was.

Q. -- at that time?

A. At that time.

Q. And there were no other standard tests used by people in your profession that you administered on that date?

A. No. Most of the testing had already been completed by Dr. Crown by the time I saw Mr. Thompson for the first time, although I was not aware of any of the results of that testing.

Q. Did you discuss with Mr. Thompson the facts and circumstances of the crime for which he stands convicted

and sentenced to death during your interview of him?

A. Yes.

Q. How did you discuss them with him? Did you ask him questions or detailed questions, Dr. Sultan, or did you just ask him an open-ended question?

A. I would have had to ask him some open-ended questions, because I didn't know the details, so -- I hadn't read any factual basis of the crime. That meeting was my first look at Mr. Thompson and my wanting to see how he presented himself without a lot of particular provocation from me, so that, because I was to have a lengthy time to interview him -- although it turned out not to be the case, at the time I thought I was going to -- that interview, I think, would be described as quite open-ended, basically me asking him to tell me about himself, about what aspects of his growing-up years he wanted to talk about.

I asked follow-up questions when he would bring a topic up. He answered a general question about the offense, and then I would ask some follow-up questions about that as well.

Q. Do you have your notes of that interview here with you to refer to?

A. I don't. They're packaged up for Dr. Blau.

Q. Did you write down every fact that Mr. Thompson

told you about his recollection of the murder of Ms. Lane on your notes?

A. I don't recall specifically, but my best guess would be that, while there's some factual material about the offense itself, my notes are much more likely to reflect his psychological state at the time and what he recalled about how he felt and what he was experiencing and what the other people around him seemed to be experiencing through his observation. So I'm sure there's factual information, but I hesitate to tell you that every single detail that he suggested to me wound up in those notes.

Q. What did Mr. Thompson tell you about the offense, as best you can recall?

A. As best I recall, Mr. Thompson talked about his relationship with the young girl that he was with for the days and weeks prior to this.

Q. Joanne McNamara?

A. Yes. And how he felt a tremendous need to protect her. He fancied himself rather as a rescuer of young women, and this part of the story came about in his description of other circumstances in which he had provided assistance to damsels in distress. Joanne McNamara was the last in a line of young girls that Mr. Thompson viewed himself as taking under his wing. He

was quite disturbed about her circumstances.

What he told me was that they were thrown out of the place that they had been staying when it was discovered that they were not in fact married. I don't know who it was who portrayed them as a married couple to the people that they were staying with, but that the truth of it was discovered, that someone contacted Joanne McNamara's mother -- or parents, I don't know which; I think mother -- to let her know that this child was in her home, the person they were staying with, that Mr. Thompson forced the victim in this case into her car at knifepoint.

Mr. Thompson was not sure whether he precisely recalled that he killed Ms. Lane -- is that correct?

Q. That's correct.

A. Okay. But that he knew that he had in fact killed her.

Q. I'm sorry. Would you say that again for me?

A. I'll do my very best. He was not sure -- and I asked him this specifically -- whether he was recalling the events from his own memory or from having heard the recitation of the facts and a reminder of his own statement to the police over the years. At this point in time, we're about 14 1/2 years after the event.

He wasn't claiming in any way not to remember,

simply was unable to make distinctions for me about which memories were specifically his and which he had read and heard about in the course of his case and had heard discussed about him. And, of course, there had been post-conviction hearings and, by then, Supreme Court decisions, and so the facts had been recited many, many times. I was not clear precisely how clear his recollection was at the end of that first interview. That was one of my issues to revisit at a later time.

Q. Does he have any recollection of actually stabbing Ms. Lane?

A. He said he wasn't sure. That was really the issue that we talked about. He said that he knew he had talked about it at some point, and he had been told he talked about it at some point, but that his emotional state at the time was pretty disrupted and aroused. At some point during that conversation Mr. Thompson began to show a lot of agitation and anxiety, kept expressing a willingness to talk, but it was clear that in remembering there was a lot of pain for him, and he expressed a great deal of remorse to me about the occurrence of the offense. Said that he had no real understanding even after all this time about how he could have been capable of such a thing. It was not characteristic of him, according to him, for him to be assaultive in that way.

Said that he had never killed anyone before and that he didn't have any reason to hurt Ms. Lane. Said that it haunted him.

Q. Now were there any visible signs you observed of this anxiety and disturbance?

A. Easier to demonstrate than to talk about verbally, so I'll do that and see if I can describe what I'm doing.

Q. Okay, and if you'll do it and maybe --

A. Narrate it at the same time.

Q. Okay.

A. Okay. When Mr. Thompson becomes agitated, he rocks back and forth in his chair, does what I've heard referred to as pill-rolling, finger rolling with both hands, rubbed his face a lot with his hands, used the same phrases over and over again, and then became what a psychologist or psychiatrist might refer to as tangential, would begin to talk about different subjects and then bring himself back to the subjects at hand, or I might direct him back to the subject at hand.

At some point he began to talk to me -- and I don't know that it was connected specifically to talk about the offense, so I want to be careful to say that to you -- but at some point during the interview he began to tell me that he had written all of the songs on the radio

that I ever listened to, and he began to tell not just me that, but any guard that wandered by in the hallway, tell himself that, told me that again and again. I disagreed with him at first to see what would happen, and he was quite secure in that belief and wasn't agitated by the fact that I challenged him. He just thought I was silly. And I think that probably would be my interpretation of agitation. Because it was the first time I saw him, I don't know if the belief system that I was hearing about that seemed so odd was connected to agitation or simply a part of what he was like, and so I made some note about that but didn't attach any particular significance to it at that time.

Q. What was his reaction when you expressed disbelief about his writing the songs?

A. He told me I was silly and patted my hand.

Q. If I understood your comments correctly, he would start out basically on point as he was talking to you about various aspects of the crime or the issues that you were talking about, and then he would become tangential, correct? Or did he start out tangential at some points and then focus back in on what he was talking about?

A. Focusing I think is an overstatement in my event. I don't think that he ever was really focused.

Q. Why?

A. Having only seen him that one time in a relatively coherent state, I don't know what he's like when his medication is properly regulated and he's at h_ best, but Mr. Thompson in general rambled. His general style of verbiage was what we would call a little loose in association. Something would remind him of something else, and he would begin talking about that before he finished talking about what he started out talking about. Was tangential in the sense that whatever associations he made in his mind that most of us would keep to our selves -- we all do them, we just don't all say them -- he would then say whatever it was that occurred to him. I didn't do any particular kind of redirecting to see how focused he could become. I simply redirected as I needed to to get a general sense of the way his thought process was working.

Q. Would you describe Mr. Thompson as being self-reflective during your initial interview with him?

A. No.

Q. The reason I asked that was you did state that he was talking about how he felt about the crime.

A. The word "reflective" means to me a more intellectual process.

Q. All right.

A. He emoted a great deal. He reflected very little. Insight, which is an intellectual kind of exercise really, almost an academic, removed exercise, is not something Mr. Thompson has very much of I don't think. He reacts very strongly emotionally, and sometimes out of control emotionally, but I don't think I'd categorize that as reflective. He was deeply hurt and deeply upset by his own behavior, became tearful, rocked a great deal back and forth in his chair, did the hand gestures that I talked about, but did he reflect upon it and describe it to me objectively? I don't think so.

Q. Was it Mr. Thompson's becoming tearful that led you to conclude that there was remorse and that alone?

A. No. I think the content of his verbalizations was pretty clear as well. I don't know what's wrong with me; how could I have done that; how could I be a beast; why was I a beast; what was I thinking; how could this happen; should never have happened; I think about her all the time; she deserved to have a life. With or without the emotion attached, the content I think is pretty clear.

Q. Was this in response to any specific question by you as to why he did this crime, or was this just part of his general rambling to you or discussion?

A. I don't think I would have asked Mr. Thompson why he committed the offense during my first meeting with him. I think he pretty much just chose the way he wanted to talk about it.

Q. You said that he described Joanne McNamara as the last in a long line of young women or damsels in distress that he was rescuing?

A. Actually, I think I described it that way.

Q. All right.

A. I don't think that's a label he would have used. Again, that indicates a whole lot of self-reflection. He simply told me about other girls that he had helped.

Q. Were you able to verify that there were other young women he was able to help besides Ms. McNamara?

A. I don't know if I'm able to do that. I haven't done that.

Q. Have you asked Mr. Kissinger or Mr. Chavis to try and verify that for you?

A. No, but it's a very interesting idea.

Q. Did you ask him how he felt he was helping these young women?

A. Yes, I did.

Q. What was his response?

A. He protected them.

Q. From?

A. Enemies.

Q. Was he more specific?

A. Different situations, different enemies. Joanne McNamara's case, her mother was the enemy. Evil men in her mother's home were the enemy. Her mother wanting her to prostitute. In a situation that he was describing to me in Hawaii -- no, maybe it was a situation that took place before he was transferred to Hawaii. In the service, he rescued two teenage runaway girls, put them up in his barracks. They came from, according to him, abusive, violent homes, the enemy being their family -- their families.

Q. Did he ever tell you that instead of rescuing young women that he assisted young men?

A. Never. I don't think so, no.

Q. Did you talk with him at all about his girlfriend Arlene during this first visit?

A. A little bit, yes.

Q. Did you bring up the topic or did he?

A. I don't remember.

Q. What do you recall was said about her and his relationship with her?

A. That he loved her very much, that he knew her for a long period of time, that they lived together when

he was in Hawaii, that he wasn't good enough for her.

Q. Did he say why he was not good enough for her?

A. I don't recall that he did specifically, no.

Q. And you didn't ask him?

A. I don't think so.

Q. You administered the MMPI-2 to Mr. Thompson. He willingly took the test?

A. He did.

Q. As you observed him, did he have any difficulty reading the test and taking it on his own?

A. He didn't have any difficulty reading it. He required a fair amount of supervision to take it.

Q. Can you elaborate on that for me, please, the supervision that was required?

A. I'll describe the level of supervision as unusual statistically, in terms of the number of MMPIs that I've helped to administer over the yeare. Mr. Thompson read some of the items aloud to me and then made rhyming sounds to some of the words. Some of the items struck him as particularly amusing, and he would laugh out loud, and I would laugh with him and suggest to him that he get back to what he was doing. It didn't wind up taking him -- part of how I suspected he might be of normal intelligence is that it didn't take him much longer than the average person who does it without the

distractions. He asked a few questions about the interpretations but took my direction when I suggested to him that he was the one who needed to make the interpretation.

Q. So by and large Mr. Thompson had no apparent difficulty comprehending the questions or interpreting them?

A. I don't believe so, and the scoring of the test doesn't reflect any difficulty with comprehension.

Q. So you never reached a point where you had to read questions to him because he was unable to read them and understand them?

A. No.

Q. Is there anything else that occurred during this first visit, this four-hour visit with Mr. Thompson, that we haven't discussed?

A. I think we have hit the high points.

Q. Did you talk with anyone else at the prison concerning Mr. Thompson during that first visit when you were out there at River Bend, or was your time at River Bend solely limited to dealing with Mr. Thompson?

A. During that first time, my time was limited solely to him.

Q. On the 2nd of February this year, you said that you spent between two and a half and three hours out at

the prison?

A. I did.

Q. And what happened during your visit? What did you do during your visit to the prison on 2 February, '99?

A. I think the answer to the question of what I did is that I observed Mr. Thompson. I observed Mr. Thompson in interaction with me, and I observed Mr. Thompson in interaction with prison officials, and I observed Mr. Thompson in interaction primarily with Mr. Chavis.

Q. Where did you make these observations?

A. We were in one room the entire time. Mr. Chavis entered that room with me. It's a small room, kind of a cell-sized room. In fact, I think it is a cell.

Q. A visitor's room?

A. It's used as a visitor's room, but I don't -- I don't think that it has the amenities of a typical visitor's room. There is a table in there, but I think it really is a cell that's set aside in the high-security area of that prison in which he could be observed from three sides, so part of what I got to observe was Mr. Thompson's reaction to the people who were observing him. It was a lot like being in a fish bowl.

Q. And the reason you went out there on the 2nd of February was why?

A. It was about time for me to go back and continue my evaluation, but prior to me planning that trip specifically, using Mr. Chavis as my contact person for the logistics, Mr. Chavis asked me if I might come and observe him. He called me at some point a week or so before the time of my visit and said what I said to you earlier, which is that he was concerned about him and thought that he wasn't doing very well and asked if I would come and look at him.

Q. What did you observe about Mr. Thompson on this visit?

A. Mr. Thompson was in terrible psychological condition. I'll describe his physical appearance first. Mr. Thompson was physically filthy. His body stank, stank to the point where I could smell him before I could see him enter the room. He looked disheveled. He came into the room wearing a dirty rag wrapped around his head. He was highly agitated, quite angry during much of the visit, sometimes threateningly so.

Q. Toward you?

A. Not toward anyone in particular. He alternated between being absolutely silent and speaking in great gushes of words, streams of words. Mr. Thompson appeared

to be in a great deal of psychological discomfort. He was not having the sort of psychotic episode where someone is comfortable being crazy. He was apparently quite tortured.

Mr. Thompson spoke in what could be described clinically as word salad at times, where words were strung together that had nothing to do with one another. His answers to questions didn't appear, on the surface at least, to have anything to do with the questions. Mr. Thompson didn't know who I was. Did not know that he was living in a prison unit, thought that he was living on a slave ship.

And there are psychologists and psychiatrists who believe in the symbolic level of speech of that nature, so I hesitate to say to you that he was not able to communicate anything. Perhaps it is that I was not able to understand much of what he was trying to tell me.

But he told stories that had to do with his enslavement and with his suffocation and with the fact that he was being destroyed by an unknown tormenter, although he knew it, he just couldn't tell me who it was or what it was.

That alternated with talk about how he was the god of the world and the king of the world and that he had seen heaven and that he had the power to set himself

free and to get us all out of the slave ship that we were living in or that we were on.

At some points he was able to say who I was in terms of knowing that I was a psychologist. At other points he told me that I was one of his vessels, one of his servants. At some point he became quite angry. Sometimes he would get very, very angry, and I was unable to detect anything external that had caused whatever the verbal eruption was.

He was kept in hand shackles as well as leg shackles during that visit and sometimes appeared very uncomfortable in them and other times seemed to be unaware that he was in them. He tried to leave the interview room -- stated some intention to leave the interview room maybe a dozen times and was distracted by myself or Mr. Chavis into continuing conversation.

After about an hour and a half, he allowed Mr. Chavis to leave the room. At first he was afraid of me. He told me that I was evil and that I was there to kill him. At some point it was all right for Mr. Chavis to leave, and, in fact, it became very important for Mr. Chavis to leave. So he dismissed Mr. Chavis, and Mr. Chavis left.

Q. You say it became important. Important to him, or did he say it was important or did you judge it to be

important?

A. He said. He directed it in some way. I'm not sure exactly what he said. Mr. Chavis asked permission to leave at some point and was told no. At that point it was okay for him to leave. Mr. Thompson seemed to be reacting very, very, very strongly to even casual observation on the part of the guards. Because of his high level of agitation, and later as I became aware, because the guards were very concerned about him and the state he was in, there were more than the usual number of people around I think, and Mr. Thompson was aware that he was being observed more closely and yelled things at the guards and pounded his hands sometimes on the table and got up from his chair and moved his body around.

At some point he was willing to remove the rag he was wearing on his head, but I think that took almost two hours. And our interview terminated when Mr. Thompson decided that I could save him if I would allow him to kiss my hand, and when I refused, he became very angry, stood up, turned his back on me, and told me to leave. Didn't use the word "leave" but said you're not here anymore.

When the guards, four guards, came in to assist Mr. Thompson in returning to his cell, whether intentionally or not, they wound up placing me between

them and Mr. Thompson. Mr. Thompson was extremely angry with the guards. I don't know why. They didn't know why. They were trying to talk with him about it. Didn't want to go back into his cell block the way they wanted him to, said that that was the incorrect door. Kept insisting that he come out the door that the guards were standing in front of, the door that I was supposed to leave by.

I actually requested that the guards move me from between them, because I was concerned that there was going to be some sort of physical altercation at that point. They were as well. I was -- Mr. Thompson's a lot taller than I am. With the thrashing around that he was doing -- they weren't physically struggling at this point; he was thrashing around himself -- I was afraid that he was going to actually hit me with his head. He was rocking his head back and forth.

Q. Gesticulating too?

A. To the extent that he could --

Q. That he could with the shackles?

A. -- with his hands shackled. In fact, I think they were on a waist band too, because I remember noticing his head moving much more than his hands. If he'd been waiving his hands in my face, I would have noticed.

The guard then spent about ten minutes, maybe a little bit less, with me, then, in the hallway and Mr. Thompson in that same room I was telling you about with all four guards around him with them talking very quietly and patiently to him. There was one man in particular that he seemed to be comforted by, and this man spoke very quietly to him in his ear about that it would be okay and he could go back to his cell now and he wouldn't let anything bad happen to him and although Mr. Thompson continued to curse, the volume of his emotionality came down, and that guard led the procession of people out the back door of that room back towards the cell block.

At that point, after they had him back in his cell, they actually brought him back to me. Mr. Thompson -- I thought this was really quite dignified behavior on the part of the custody officers. Mr. Thompson was apparently in a room in which he was not allowed to have paper or pencils or any object at all, but he had been telling me for those two and a half or three hours by that point that he had some documents that he needed me to take to his lawyer for him. Sometimes they were a secret code or a map to a gold mine. Sometimes those documents came up as his salvation. But the guards actually led him back to his cell to let him

look for those documents, and then they led him back into the room so that he could tell me from the doorway that they had been stolen.

Q. So he never delivered any of these documents to you?

A. There weren't any such documents.

Q. Okay.

A. And the guards assured me that there had not been any documents stolen, that in fact he was not able to have anything with him and hadn't for some time so that there wasn't anything missing from his cell.

Q. Were you able to carry on any sort of a conversation with Mr. Thompson during this visit?

A. I think that depends a lot on what you think a conversation is. We were not conversing as you and I are. Words were being exchanged back and forth, and at some point he thought that we were making contact, because he appeared to be pleased when he was talking to me or when he was talking to Mr. Chavis. He didn't say anything that made any sense to me particularly.

Q. And after they took Mr. Thompson away, you didn't see him again on that date?

A. No, I didn't.

Q. Did you, subsequent to Mr. Thompson being taken away, talk with any of the guards?

A. I did. Two in particular.

Q. Okay.

A. I don't know their names.

Q. What was the nature of those conversations? Before you answer that, Doctor, did you make any notes about those conversations with the guards?

A. I did, as soon as I left the prison as a matter of fact. And I in fact had to make notes about that interview after I left Mr. Thompson's presence, because part of what he did -- and I neglected to tell you this earlier -- is that he studied very carefully every single pen mark that I made on my paper, took the pad out of my hand, made his own notations on the pad, read words out loud, made up different words, told me to write down various words and spelled them for me.

Q. Are those notations that he made on your pad part of the documents that are being forwarded to Dr. Blau?

A. They are.

Q. What did you discuss with the correctional officers?

A. I was very alarmed by the condition that I saw Mr. Thompson in. When I had seen Mr. Thompson about five and a half months before that -- no, I guess maybe not quite that long, about five months before that -- he was

in a much, much better psychological state.

The level of anguish and disorientation and confusion and anxiety that he was living in was very alarming to me, and I asked the correctional officers who came back to talk to me how long he had looked like that. I asked them what they thought about what was happening to him. They indicated to me that they didn't understand why he had been allowed to get into that kind of psychological position. They thought of him as a mental health inmate. They thought he had longstanding psychological problems, according to their report. They talked to me about the fact that there was a unit either at that prison or somewhere nearby for severely mentally ill inmates, and they both expressed the belief that Mr. Thompson needed to be housed there.

One, at least, of them had known him for many years and said he had never been as bad -- in his words, as bad as he had been in the last several weeks, and they indicated to me that some custody officers had been relaying information about his psychiatric condition to the contract people who were mental health service providers for the prison unit and that it didn't seem that much was being done.

Q. Are the names of those correctional officers with whom you spoke in your notes?

A. They're not. I was upset enough and physically a bit intimidated by the interaction I just had with Mr. Thompson that I didn't look at their name tags. When I left, I immediately called Mr. Chavis and described what I could remember about their physical appearance and asked him to identify them.

Q. Was Mr. Chavis able to identify them?

A. I don't know.

Q. He's never gotten back to you on that point?

A. No, he has not.

Q. Did you make any attempt to talk to the prison mental health personnel after this episode with Mr. Thompson on the 2nd of February, on that particular date, before leaving the prison?

A. What I did was talk to Mr. Kissinger seeking permission of some kind from him about how to pursue communication of the kind you're describing. He suggested to me that he didn't think it was appropriate at that point for me to directly contact the prison personnel unless I thought Mr. Thompson's life was in danger -- in which case I wouldn't have asked his permission, I just would have told him that's what I needed to do -- and he said that he would communicate it in whatever way he saw appropriate.

Q. Had you planned to do any testing of

Mr. Thompson when you went out there on the 2nd of February?

A. No.

Q. I guess that brings us to April 7th.

A. Yes.

Q. What happened, then, on that date?

A. I was scheduled to appear at a hearing that I don't really understand the nature of exactly, so I can't tell you what it really is legally, but there was some kind of hearing in which the issue of his competence to proceed in his appeals was going to be discussed.

Q. That's okay. Mr. Kissinger and I know what the hearing was supposed to be, so you just tell me what it was that happened out there, and I think we'll be fine.

A. Okay. I showed up at whatever city it was in the night before the hearing, and I had asked to speak with Mr. Thompson, because present competence is such a fluid condition. Mr. Kissinger and I both met with Mr. Thompson together -- he and I sat side-by-side with Mr. Thompson across the table -- and I talked to Mr. Thompson, and I thought that probably within the legal definition of competence to proceed as Mr. Kissinger explained it to me, at the time that I met with him, he probably met that definition. He probably met that standard for competence.

Q. What sort of things did you talk about with Mr. Thompson?

A. To describe it as talking about with is probably not an accurate characterization. Mr. Thompson was very angry with me. He did not want to talk with me.

Q. Was that how he expressed his anger, simply I don't want to talk with you, or were there other signs of anger directed toward you?

A. Very, very, very rapid clipped speech about how he didn't know why we had to meet, didn't want to meet, the sort of tone of voice I'm using right now. Very clipped, very rapid. He had met a good doctor; he had already talked to a good doctor; why was I there; could I leave him alone; he didn't want to talk about it again; he didn't want to tell me whether he knew where he was; he knew lawyers were representing him; he knew lawyers were trying to kill him; he knew he was in a jail; couldn't I see the bars; was I blind; you know, obviously there were bars.

Some of what he said wasn't coherent, but when I asked him pointed questions about his legal circumstances and about the function of the court, he answered those questions, not directly exactly, but let me know that he understood. He didn't seem to understand that the doctor that he liked so much had been sent there

by the State.

Q. Dr. Blau you mean?

A. Yes.

A. According to Mr. Thompson, the man who came to see him was going to save him and quite a wonderful fellow and looking out for his best interests and couldn't I just go away. Said they made contact. They had very good harmony. They had a good -- I think connection is the word that he used. That it had been a significant meeting and that I ought to consult with the doctor if I wanted to learn something. He was quite a learned man and a good man, unlike the person I was.

At some point he knew who Mr. Chavis was, said some angry things about him. At some point he wasn't sure who Mr. Chavis was. But he knew that Mr. Kissinger was his lawyer each time I asked him. And so he tolerated my presence for about 45 minutes, maybe an hour.

Q. Was he angry toward Mr. Kissinger?

A. I -- my interpretation is that he was angry with Mr. Kissinger for bringing me into the room. He thought Mr. Kissinger was doing kind of a crappy job and told him that he wished he would just get some money so he could get a decent lawyer, but he said that Mr. Kissinger hadn't been horrible exactly so far, right

at that point, and although he would become free when Mr. Kissinger raised funds for his release, he knew that he was stuck with Mr. Kissinger for at least the next few days, which said to me he knew who Mr. Kissinger was. When I asked him if Mr. Kissinger was actually a fund raiser or whether he was a lawyer, he said he was a lawyer, so -- but he wasn't really happy with anybody in the room.

He told me actually that he -- I asked him when the last time was he had a bath because he looked like he had showered, and, in fact, whoever was the chief custody officer -- I think it might have been a captain -- Mr. Kissinger and I were in his office waiting for Mr. Thompson to be brought to whatever room we were going to be allowed to sit in, and he mentioned to us in passing that Mr. Thompson had eaten his dinner or had eaten something and had bathed.

When I asked Mr. Thompson when he bathed, he told me it had been months. When I asked him if he didn't remember taking a shower, he became very angry with me, so I didn't know whether he was angry because he didn't want to talk about taking a shower or because he didn't remember taking a shower.

Q. On 2 February did you ever ask him about his hygiene or lack thereof?

A. Did I ask him? I must have, because he told me that he didn't like water. I told him he stank, so that doesn't qualify as asking, but I think we had those two exchanges at least.

Q. Were you able to elicit from him why he allowed his personal hygiene to deteriorate at that point in time?

A. Can't, can't, can't. Afraid, afraid, afraid.

Q. Of water, water, water?

A. Yes.

Q. Okay. Did you administer any tests to Mr. Thompson on 7 April '99?

A. No.

Q. Do you intend to administer any other tests to Mr. Thompson between now and the evidentiary hearing in September of this year?

A. I don't think so.

Q. You had to think for a moment about that.

A. Well, it would be very interesting and maybe clinically interesting. That's what I have to decide about, maybe if it would be clinically significant to do some projective psychological testing with him. The judgment that I'll make is whether it's likely to be so stressful for Mr. Thompson that the stress would outweigh whatever possible gains there might be.

I'm also not at all sure that I'm going to be able to complete my evaluation by September, because if Mr. Thompson's condition is not improved beyond what I saw the last time I visited with him, I'm not sure how one might do that.

Q. And that last time would be 7 April, correct?

A. Yes.

Q. What tests, as we sit here today, do you think you would perhaps like to administer to further assist you in completing your evaluation of Mr. Thompson?

A. If I administered any further tests, I think that I would like to administer the thematic and perception test that Dr. Copple administered to him in the early 1990s. I thought the results that he obtained at that time were quite interesting, and it would be interesting to see how that had changed over time.

Q. Any others?

A. None that I can think of. He's been given quite a large number of tests by all the psychologists who've had their hands on him over the last year.

Q. What remains to be done so that you can complete your evaluation of Mr. Thompson?

A. Are you asking me about the ideal world or the world of what minimum could I survive with in order to be secure about my opinions?

Q. Why don't you give me both?

A. Okay. In the ideal world, I would have two or more further opportunities to spend time talking with Mr. Thompson about his life and to be able to review with him information about his family life and his economic circumstances that has been revealed to me through other sources.

Typically I'm in a position where it's the individual him or herself who might be revealing those circumstances to me first, and then I might be seeking collateral information to substantiate. In this case, I don't have any of that information from Mr. Thompson and all of it from other people, so it would be very helpful to know, when confronted with the facts as they have been told to me, whether Mr. Thompson could let me know something about how that affected him emotionally.

That would let me be able to have opinions beyond simply what psychologists and psychiatrists know to be true statistically in certain circumstances. Then I would be able to know that that was true for Mr. Thompson as well.

Q. And minimally? I'm sorry. Are you through telling me what you need for the ideal world?

A. One more thing I think in the ideal world. I think I would like to speak with another relative or two.

Q. Have you spoken to some relatives?

A. I have. This family has been able to help me understand a great deal of the early dynamics of Mr. Thompson's life, and, because he's such a poor historian -- even was during the first visit -- collateral witnesses in this case are quite important because, unlike how Mr. Thompson's been portrayed by Dr. Blau, Mr. Thompson's very reluctant to talk about whatever level of disability or illness or suffering he might have experienced, and although we did talk about some of the same events in his family life that later I talked about with his grandmother and his sister, he certainly minimized the damage to him of those circumstances.

Q. Have you had a social history prepared on Mr. Thompson?

A. Not a formal social history, no.

Q. Do you intend to have one?

A. No, not at this time. I don't.

Q. I take it there has been no prior social history done on him that you've been provided. Am I correct in assuming that?

A. I think I have been provided it as part of the prison records. I mean, I think that there are social histories that are part of various evaluations that have

been done on him in the past. I don't know how formalized they are, but certainly there was some information about his family.

Q. You state that you've talked with his grandmother?

A. Yes.

Q. When was that?

A. Yesterday.

Q. First time?

A. First time.

Q. And his sister?

A. His sister, Nora Wharton.

Q. W-a-r-t-o-n?

A. W-h-a-r-t-o-n.

Q. And when did you talk with her?

A. Yesterday as well.

Q. First time?

A. Yes.

Q. Have you talked with any other family members about Mr. Thompson's background?

A. No.

Q. Have you attempted to talk with his brother?

A. His older brother, Curtis, is the person I was referring to earlier, and I did attempt to call his house at one point last night, and he was not at home.

Q. Have you attempted to talk with any of Mr. Thompson's schoolteachers or school administrators?

A. No. I have, however, reviewed a large number of depositions and pieces of testimony that are those people that you're describing right now.

Q. Neighbors from when he was growing up, have you talked with any of them?

A. No, I have not.

Q. Just reviewed any testimony perhaps from them?

A. Yes. That's correct.

Q. Have you seen the -- says here extract of Mr. Thompson's Navy records taken from trial counsel's file, post-conviction hearing Exhibit 3. That does not include the actual transcript of his court-martial, does it? Have you reviewed the transcript of his court-martial, called the record of trial?

A. I'm trying to think if the actual transcript is in there. I think that in that exhibit is a summary of the transcript, a factual finding. I don't know if I have -- yeah, I think I have seen the testimony of at least some of the witnesses, so it may be that the answer to your question is yes and I don't know.

Q. Or perhaps it's just the summary of the testimony of the witnesses?

A. Perhaps it is, but I don't think so.

Q. The record of trial, I believe, would be this size document (indicating), and it's about 3/4 to an inch thick I believe.

A. I think that is part of the packet that I received.

Q. Have you attempted to contact any of his supervisors in the military?

A. No.

Q. Have you talked with his former girlfriend, Arlene?

A. Cajulao. No, I did not. I actually interviewed Mr. Chavis, who spent -- let me see if it was three or four days -- with her. It looks like from July 29th through August 2nd of last year, 1998, interviewing her in Honolulu, Hawaii. Mr. Chavis and I have talked about the content of his interviews with Ms. Cajulao on several occasions over the last several months.

Q. Did you find her observations of Mr. Thompson beneficial to you?

A. I did.

Q. Basically what about her observations was beneficial? What points did she bring out that you find important in reaching your diagnosis?

A. Ms. Cajulao described to Mr. Chavis that during

the course of the four-year relationship she had with Mr. Thompson, Mr. Thompson became increasingly bizarre in behavior that he exhibited. There were a number of occasions in which there were incidents that took place in the military that he described to her as him having been attacked. The facts of the situation may in fact not be that, but that was his description to her, that he was being picked on, that he was being bullied, that he was being attacked.

He became depressed, according to her, over time and increasingly paranoid. At some point she would come home from work, and he would be in their home with the curtains drawn, standing by himself in the dark telling her that people were after him and that he didn't want people to be able to look at him through the windows. She remembers being quite concerned about his behavior.

There are a couple of situations that she described to Mr. Chavis in which, with no external provocation that she could identify, Mr. Thompson became quite violent with her, and she saw those behaviors as very unusual for him and reported to Mr. Chavis that Mr. Thompson seemed unaware of what had provoked it and didn't even seem after the fact to remember what had taken place, would simply, after a period of time, calm

himself down and return to normal behavior. I found all of that quite significant.

Q. How did he become violent with her?

A. There's one episode described in which they're in the kitchen cooking dinner or cleaning up the dishes, and he actually threatened her with a knife. He told her that he was going to kill her.

Q. Any other specific violent episodes related to you?

A. There's an incident in which I believe he struck her.

Q. With his fist or with an object?

A. With some part of his body. I think he may have grabbed her around the neck.

Q. Do you know whether or not she ever reported any of these assaults on her?

A. I don't know.

Q. How was this information conveyed to you? Was this a written statement that Mr. Chavis had taken from Ms. Cajulao? Is that how you pronounce it?

A. Cajulao is what he tells me.

Q. Cajulao.

A. Yes.

Q. Was this a written statement, or are these Mr. Chavis's notes that you have relied on?

A. They're his notes I've relied on. It's an oral report that he made to me, and I've made some notes of that report.

Q. So he did not actually give you his notes?

A. That's correct.

Q. The notes that you made, are they among the materials that are going to Dr. Blau?

A. Yes.

Q. Have you talked with Mr. Thompson's trial attorneys in this matter?

A. I have not.

Q. Do you intend to?

A. Again, it's a wonderful idea. That might be a really significant source of information. In reality, in the duration of an evaluation, anyone who can provide me with information about Mr. Thompson increases the depth of my understanding of him, and so that would be a very nice thing.

Q. What about his post-conviction attorneys?

A. My opinion about that is exactly the same.

Q. Have you talked to them?

A. No, I have not talked to them.

Q. Have you talked to any other custodial officers out at River Bend other than the two that you mentioned you spoke to on 2 February of this year?

A. Not about Mr. Thompson, no.

Q. You've talked to other custodial officers simply about getting in and out of the prison? Administrative type things?

A. Sometimes I've talked to them about whether they like their jobs, or they wanted to know what work was like in North Carolina, so it might be that kind of conversation.

Q. Since I just received this report at the outset of the deposition, I haven't really had a chance to go through it. Is this a preliminary report, then, since you haven't completed your evaluation?

A. It's somewhere between a preliminary report and an amended report and amendments that will be attached to it. Let me say it better than that. I think that I have enough information about Mr. Thompson so that I am comfortable with the opinions that I suggest, that I make in this document. I think that as additional information is forthcoming it will add to the depth and the complexity of my understanding.

MR. PRUDEN: I think at this time what I'd like to do is, since I've had you talking for over an hour now, why don't we go ahead and take a break for maybe about 15 minutes or so, and that'll give me an opportunity to take a look at the report, and that might

expedite things.

(Recess from 2:35 p.m. to 2:48 p.m.)

BY MR. PRUDEN:

Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

A. During my interview with Mr. Thompson's sister -- and let me say all of her names -- Ms. Nora Jean Hall Wharton, Ms. Wharton spontaneously began to talk to me about Mr. Thompson's behavior in the time period immediately following their mother's death.

By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. She would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

One of the things that we know about people who develop thought disorders is that frequently in childhood

you'll see one or more peculiarities in behavior. This would certainly fit in that category. She recalls other instances.

Q. Sort of a self-punishment or a self-exorcism type thing?

A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript. She told me much more detail about actually the extent of those kind of emotional outbursts.

At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the time, and Nora Wharton was not really permitted much interaction

outside of their home.

Q. Did Ms. Wharton tell you how she was beaten?

A. Yes. She was beaten with what she referred to as a tennis shoe on one occasion.

Q. Like a sneaker?

A. Yes. In the street in front of the neighbors, beaten to the point where she had to be assisted in walking home afterwards. She was beaten with an electrical cord at some point. Mr. Thompson observed both of those beatings and became hysterical.

She recalled another episode during which her biological father was brutally beating and raping their mother on the floor in front of them when the children were quite small, perhaps Mr. Thompson was himself three or four. She was maybe four or five. Mr. Thompson's reaction to that was to stand and scream and scream and scream and scream during the entire episode.

Any of the -- taking the self-injury aside, setting that aside, any one of those behaviors in isolation might not be particularly significant. Putting them together, we begin to see a pattern of intense emotional reactivity.

Q. So basically, if I understand it, it's the self-injurious behavior and the crying and the way you see him reacting to these physical abuses of others?

A. Yes.

Q. And that is indicative of a sign of mental illness to you? I just want to make sure that I'm understanding what you're telling me. If I'm not, please explain it to me.

A. I think I understand your question. It is an early indicator of a problem that's likely to develop. With the benefit of hindsight, it takes on the significance of a precursor, because then we see the escalating pattern of dysfunction and abnormality.

Q. Sort of a causal relationship is what you're seeing developing?

A. I'm not sure what causes what. There are often early indices of later mental illnesses that you don't know exactly what it's going to look like later, but you realize in looking at the child that there's a high likelihood that something is not going to be right when that person achieves maturity.

Q. Because of the environment, for example, in which he's growing up?

A. Perhaps. Perhaps because of the genetics involved. Perhaps because of the situations he's exposed to, as you said, the environment. Perhaps because of whatever factors there are. Perhaps nutrition plays a role in this. These children were without food for

significant periods of time as well. I don't know all of the reasons, but what I know is that if you look back in the childhood of this man, the beginnings of mental illness are apparent.

Q. Besides Ms. Wharton's report of lack of food, have you seen any evidence that the children were taken away because of malnutrition?

A. No. Ms. Wharton did tell me, however, that there was a neighbor who had planned to make a report to Social Services, so perhaps I'll have the opportunity to interview that neighbor as well.

Q. And is there authority in terms of -- strike that. You don't know to what degree the children were malnourished then?

A. No. I don't know. I do know that -- and this is confirmed by the grandmother -- in the six weeks approximately following their mother's death, the children were left alone virtually all of the time because Ms. Lamar was drunk and in bed, and so we have a five, a six, and a seven-year-old child in a house with no food. They would occasionally steal money from underneath her mattress while she was sleeping, and one of them would go to the store to try to find some food. Occasionally a neighbor would provide them with a meal or a can of food. I don't know whether they were

malnourished over an extended period of time. I do know that there is, from Ms. Wharton's perspective, rather serious psychological damage from that time.

Q. You have no medical documentation showing any malnourished condition or that it's caused some problem with his brain, do you?

A. I don't. These children were never taken to the doctor, so there wouldn't be any medical documentation. There's probably documentation in the school system. According to Ms. Wharton, Ms. Lamar was so drunk at the beginning of the school year following their mother's death that she forgot to sign the children up for lunches at school. They didn't have anything to eat during the day, so they forged her signature on a permission slip so that they could eat. They were discovered and punished by the school superintendent people, and a form was sent home to Ms. Lamar. She then signed it, and the children were able to eat lunch after that point. A couple weeks passed for all of that to get straightened out.

Ms. Wharton has undergone a lot of therapy in recent years and says that she's now able to describe situations that she wasn't very comfortable acknowledging to herself, these being one of them.

Q. Your diagnosis for Mr. Thompson is

schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur -- lots of different kinds of delusions actually -- auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

The psychological testing early on in Mr. Thompson's incarceration confirm the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

A. Well, it's interesting, because the state Court of Appeals actually notes this, that prior to his entry into the military Mr. Thompson is described almost uniformly -- well, in fact, uniformly according to their opinion -- as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

At some point -- and we don't know, because I haven't seen any psychiatric records from the military at this point; I don't know if there are any -- we don't know whether or not the change in Mr. Thompson is perceived as other than behavioral disruption, but, in fact, his description of that time is that he began to notice that people were trying to hurt him all the time, that officers and other people of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found

out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

Q. This is what he related to you during your interview last August?

A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, "different." Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him

as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her to approach her grandmother about what to do for treatment for him.

Q. Did they ever attempt to get treatment for him?

A. No, they did not.

Q. And did they say why?

A. No. Ms. Wharton did not say why. She said that she felt greatly guilty about that.

Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

A. There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are

frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

Q. Meaning?

A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

Q. When you say "he's not in control of what he's doing," are you saying that it's impulsive behavior?

A. If I am emotionally disregulated, if I'm over-aroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I

also think things are going on that aren't, I have a combination in which yes, I suppose you could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

Q. Does this disorder prevent Mr. Thompson from planning his activities?

A. Sometimes, yes, it does.

Q. And so the inability to plan, would that be a factor that would prevent him from conforming his conduct to the requirements of the law?

A. If that were in operation at some time. In the history of the Department of Corrections' mental health records, when he's properly medicated I don't think that's true about him.

Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicated he does not always have the ability to plan?

A. Those two things are true. It's also true that if he's inadequately medicated or improperly medicated he doesn't have the ability to plan anything. I don't know whether he has impulses. I think he's all impulse, so to have impulses implies that there's a part of you that's not impulsive. For example, when Mr. Chavis and I saw

him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that's why I have to put that qualifier in there.

Q. What evidence prior to his incarceration do you have that Mr. Thompson was hallucinating or suffered hallucinations -- excuse me, experienced hallucinations?

A. Well, the evidence of hallucinations is an interesting thing since the only way that we know if somebody is hallucinating is if they tell us. If you're asking me if there's documentation, the answer is no, because Mr. Thompson never was taken for treatment as best I know. He doesn't remember, at least according to his report to me, whether he received any treatment in the military. He remembers being told that he needed treatment in the military, and he remembers that he thought he wanted to see a psychiatrist in the military. He cannot remember if he actually ever saw such a doctor. It's possible that there are records that exist that will have exactly the evidence that you're talking about, but I haven't seen them.

Q. Have you attempted to obtain his military medical records?

A. Do you mean have I asked Mr. Chavis to get

those for me? Yeah, I have. I don't know what they'll show. I rather suspect that Mr. Thompson never received any medical treatment of a psychiatric nature in the military. He didn't like to tell anyone about what was happening to him. The evidence that I have has to do with the reports of people who observed him, who observed him moving his lips and talking when there wasn't anyone present, that being his grandmother.

Q. And this is after his return, correct?

A. Yes. And I have Mr. Thompson's report. He wasn't happy to talk about it is my opinion, but he acknowledged to me that it's possible that when he thought he was being followed while he was in the military that maybe there wasn't anyone there. And when he saw people looking in his window, which would qualify as hallucination, it's possible that there wasn't anyone there looking at him either.

Q. Do you know if Mr. Thompson has filed any kind of claim with the Veterans Administration for his condition while in the military?

A. I don't have any idea.

Q. Any other evidence in the record prior to his incarceration that would be indicative to you that he was experiencing hallucinations --

A. No.

Q. -- other than his self-report?

A. And the report of the sister and his grandmother. Are we talking about just documents?

Q. Yes.

A. No. No documents.

Q. Or any other reports from other individuals?

A. Not at this time, no.

Q. Bear with me for just a minute, please.

A. Sure.

Q. You're familiar are the term malingering?

A. I am.

Q. What steps during your evaluation process have you undertaken to determine whether or not Mr. Thompson might be malingering?

A. The MMPI-2 has several scales that are set aside to elicit the possibility of trying to portray one's self in an inaccurate manner. Mr. Thompson performed within normal levels on all the validity scales. Dr. Blau gave Mr. Thompson several measures of malingering, and he scored within normal limits on all of those. There are normal test results found within the prison records, and I have my almost 20 years as a clinical psychologist with which to make clinical judgments.

MR. PRUDEN: I believe that's all the questions

I have. Steve?

MR. KISSINGER: None.

(Signature reserved.)

(Whereupon, at 3:16 p.m., the taking of the instant deposition ceased.)

_____

Signature of the Witness

SUBSCRIBED and SWORN TO before me this ____ day of _____, 19__.

_____

NOTARY PUBLIC

My commission expires: _____

E R R A T A S H E E T

RE: GREGORY THOMPSON v. RICKY BELL, WARDEN

DEPOSITION OF: FAYE E. SULTAN, PH.D.

Please read this original deposition with care, and if you find any corrections or changes you wish made, list them by page and line number below. DO NOT WRITE IN THE DEPOSITION ITSELF. Return the deposition to this office after it is signed. We would appreciate your prompt attention to this matter.

To assist you in making any such corrections, please use the form below. If supplemental or additional pages are necessary, please furnish same and attach them to this errata sheet.

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CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)
COUNTY OF CABARRUS)

I, Dayna H. Lowe, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

DAYNA H. LOWE
Court Reporter
Notary Public in and for
County of Cabarrus
State of North Carolina

My commission expires July 22, 2002.

United States District Court

Western DISTRICT OF North Carolina

Gregory Thompson

V.

Ricky Bell, Warden

SUBPOENA IN A CIVIL CASE

CASE NUMBER: E.D. Tenn. No. 4:98-CV-6

TO: Paye Sultan, Ph.D.
8430 University Executive Park Dr.
Suite 690
Charlotte, North Carolina 28262

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM:
	DATE AND TIME:

☒ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Mecklenburg County District Attorney's Office 700 E. Trade Street Charlotte, North Carolina	22 July 1999 1:00 p.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):
All items listed in Attachment "A" to this subpoena

PLACE	DATE AND TIME
Mecklenburg County District Attorney's Office 700 E. Trade Street Charlotte, North Carolina	22 July 1999 1:00 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more offic directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matte on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

[illegible] K. Gilbert Attorney for Petitioner	DATE 9 Jul 99
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Glenn K. Gilbert, Assistant Attorney General 425 Fifth Avenue, North, Nashville, Tennessee 37243, (615) 741-8207	

(See Rule 45, Federal Rules of Civil Procedure Parts C & D on Reverse)

If action is pending in district other than district of issuance, state district under case number.

EXHIBIT
1
7-23-99

Faye E. Sultan
Curriculum Vitae
October 19, 1996

PRESENT STATUS

University Psychological Associates, P. A.
Director, Clinical Psychology and Forensic Consulting Practice

EDUCATION

University of North Carolina at Chapel Hill 1974-1977 B.A.
University of Georgia 1978-1980 M.S.
University of Georgia 1980-1982 Ph.D.

PROFESSIONAL EXPERIENCE

University Psychological Associates, P.A., Charlotte, N.C.
1985-present
Director

University of North Carolina at Charlotte, Charlotte, N.C.
1984-1988
Assistant Professor

University of North Carolina at Charlotte, Charlotte, N.C.
1982-1984
Lecturer

University of Georgia, Athens, Georgia
1981-1982
Clinical Supervisor

University of North Carolina at Chapel Hill,
Department of Psychiatry, Chapel Hill, N.C
1980-1981
Clinical Intern

University of North Carolina at Chapel Hill, Chapel Hill, N.C.
1980-1981
Instructor

Planned Parenthood Association, Atlanta, Georgia
1977
Health Educator
Women's Health Couseling Services, Inc.,Chapel Hill, N.C.
1975-1977
Director

CONSULTING ACTIVITIES

University of North Carolina at Charlotte
Couseling Center
1982-1984
Associate Staff Member (Clinical Psychologist)

North Carolina Correctional Center for Women, Raleigh, N.C.
1982-1988
Consultant

WomenReach, Charlotte, N.C.
1983-1987
Consultant

North Carolina Department of Corrections
Treatment Facility for Women (Half-way House). Charlotte, N.C.
1983-1985
Consultant and Member of the Community Advisory Board

Sheriff's Citizen's Advisory Committee, Mecklenburg County, N.C.
1985-1987
Member

M.E.A.N. (Missing, Exploited, Abused Children's Task Force).
Community Services Network to Prevent and Treat the Abuse of Children. Mecklenburg County, N.C.
1986
Member

ECO (Energy Committed to Offenders) Women's Halfway House
Steering Committee, Charlotte, N.C.
1986-1987
Member

L.A.M.P. (Legal Assistance to Mothers in Prison) Guilford County
Women's Residential Facility, Greensboro, N.C.
1986-1987
Member, Board of Directors and Clinical Consultant.

The North Carolina Department of Corrections.
1987-1988
Co-designer and clinical consultant for a treatment program for physically/sexually abused female inmates funded by the Department of Corrections (This program was developed and implemented with funding from the Z. Smith Reynolds Foundation 1984-1987).

Mecklenburg County Community Penalties Program Committee
1987-1989
Member, Board of Directors

North Carolina Department of Crime Control and Public Safety
Community Penalties Programs Sex Offender Committee
1988
Co-Chair

Western Carolinians for Criminal Justice, Asheville, N.C.
"Women at Risk", A Treatment Project funded by Buncombe County United Way and the State of North Carolina.
1988-present
Clinical Consultant

Child Mental Health Evalution Program
1988-present
Consulting Evaluator

North Carolina Alternative Sentencing Association
1989
Member, Board of Director

Sexual Assault/Domestic Violence Advisory Committee NC
Council on the Status of Women
1990-1994
Committee Member

PUBLICATIONS AND RESEARCH

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Vosk, B.N., Chelune, G.J., Sultan, F.E., Ogden, J.K. & Waring, E. Differences in Self-Disclosure Patterns in Clinical and Non-Clinical Couples. Southeastern Psychological Association, Atlanta, Georgia, March, 1981.

Sultan, F.E., Chambless, D.L., O'Neill, C., Garrison, S., & Jackson, A. The Effect of Pubococcygeal Exercise on Female Orgasmic Response. Southeastern Psychological Association, Atlanta, Georgia, March, 1981.

Chelune, G., Vosk, B. N., Sultan, F. E., Ogden, J. K., Waring, E. Marital Intimacy and Self-Disclosure. American Psychological Association, Los Angeles, California. September, 1981.

Sultan, F. E., & Johnson, P. Factors Contributing to Dropout in a Psychological Rehabilitation Program for the Chronically Emotionally Disabled. Southeastern Psychological Association, Atlanta, Georgia. March, 1983.

Sultan, F. E., Long, G. T., Kiefer, S. A., & Schrum, D. The Female Offender's Adjustment to Prison Life: A Comparison of Psychodidactic and Traditional Supportive Approaches to Treatment. Southeastern Psychological Association, New Orleans, Louisiana, March, 1984.

Sultan, F.E., Fennell,J., & Wilson, D. Sexual and Physical Abuse: Breaking the Cycle. Invited address to the North Carolina Correctional Association Annual Conference, Greensboro N.C., November. 1985.

Sultan, F.E. How to do a Better Assessment Interview that Confronts Race, Sex, and Class Issues. Invited training workshop for the North Carolina Community Penalties Program Staff Training, Boone, N.C., 1986.

Sultan, F.E., Long, G. T., Fennell, J., & Wilson, D. Sexual and Physical Abuse: Breaking the Cycle. Invited address to the 116th Annual Conference of the American Correctional Association, Las Vegas, Nevada, August, 1986.

Sultan, F.E., & Tyson, W.M. Abused Clients: What do we Need to Know about Battered Women's Syndrome and Abused Children's Syndrome in Developing Community Punishment Plans? Invited address to the North Carolina Community Penalties Program Staff Training, Boone, North Carolina, November, 1987.

Sultan, F.E. The Detection, Treatment, Counseling, and Prevention of Family Violence. Invited address to the Second National Workshop on Female Offenders, Raliegh, North Carolina, April, 1987.

Tyson, W.M., & Sultan, F.E. Community Penalties Programs and Sentencing the Sex Offender. Invited workshop at the North Carolina Community Penalties Program Staff Training Conference, Winston-Salem, N.C., February, 1988.

Sultan, F.E., & Lancaster, J., Juvenile/Adult Female Offenders: A Legacy of Abuse. Invited workshop at the Southen States Correctional Association, 19th Annual Conference, Charleston, West Virginia, July, 1988.

Sultan, F.E. The Victim's Point of View. Invited presentation as panelist at Marital Rape Conference funded by Western Carolinians for Criminal Justice, Asheville, N.C., February, 1989.

Sultan, F.E., & Clarke-Sayer, E., Women at Risk: A Community Treatment Model for Female Offenders. Invited workshop at the Fourth Annual North Carolina Community Penalties Training Conference, Greensboro, N.C., March, 1989.

Sultan, F.E. Looking Beneath the Surface: The Assessment Treatment and Placement of Non-Violent Offenders. Invited moderater for training seminar at the North Carolina Community Penalties Progran Staff Training, Raleigh, N.C., June, 1989.

Sultan, F.E. Outpatient Treatment of Severly Physically/Sexually Abused Adults and Adolescents. Invited presentation to the Charoltte Psychiatric Society, Charlotte, N.C., October, 1989.

Sultan, F.E. The Reasons for the Journey: A Women's Journey...To Prison. Keynote address at a seminar sponsored by the Episcopal Diocese of North Carolina, Greensboro, N.C., November, 1989.

Sultan, F.E. The Role of a Psychologist in Child Sex Abuse Cases: A View from North Carolina. Invited presentation to a criminal law seminar sponsored by the North Carolina Academy of Trial Lawyers, Charlotte, N.C., March, 1990.

Sultan, F.E. Recognizing and Assessing Abuse as Potential Mitigation. Invited presentation to the North Carolina association of Public Defenders, Wrighsville Beach, N.C., May, 1990.

Sultan, F.E. Between the Cracks: Incarceration, Substance abuse, and Reproductive Health Needs of Women. Invited presentation to the 6th Annual Addiction Conference: Focus on Women. Boone, N.C., May, 1992.

Dayan, M., Stein, G., & Sultan, F.E. Mitigation Evidence/Investigation: Conceptualization and Presentation. Invited presentation to the North Carolina Academy of Trial Lawyers, Greensboro, N.C., September, 1992.

Hill, H. & Sultan, F.E. Presenting Expert Testimony: Selection and Preparation of the Expert. Invited presentation to the North Carolina Bar Foundation Continuing Legal Education Seminar, Greenville, N.C., August, 1993.

Sultan, F.E. & Engel, G. Presenting Expert Testimony: The Expert's Perspective. Invited presentation to the North Carolina Academy of Trial Lawyers, Greensboro, N.C., September, 1994.

Britton-Watkins, C., Hahn, T., Lewandowski, D., Sultan, F.E. Human Bio-Psycho-Social Development and Change. Invited panel presentation for North Carolina Community Penalties Programs Case Developer School, Office of the Courts, Chapel Hill, N.C., June, 1995.

Sultan, F.E. & Lancaster, J. Managing the ...Isms Within Us: Cross-Cultural and Other Issues Relating to Managing Women and Girls. Invited presentation at The Sixth National Workshop on Adult and Juvenile Female Offenders, Myrtle Beach, South Carolina, November, 1995.

Sultan, F.E. The Impact of Violence on Women and Children. Invited presentation at The Sixth National Workshop on Adult and Juvenile Female Offenders, Myrtle Beach, South Carolina, November, 1995.

Sultan, F.E. The Task of the Mitigation Specialist in Assessing Posttraumatic Stress Disorder and Childhood Abuse Issues. Invited presentation for mitigation expert training seminar sponsored by the Center for Death Penalty Litigation, Inc., Chapel Hill, North Carolina, September, 1996.

UNPUBLISHED ARTICLES

Sultan, F.E. Ward behavior changes as a function of patient groups at a state mental hospital. University of North Carolina at Chapel Hill, 1977.

FUNDED RESEARCH

The female offender's adjustment to prison life: A comparison of psychodidactic and traditional supportive approaches. North Carolina Correctional Center for Women, Raleigh, North Carolina, (UNCC Summer Grant), 1983, $1,000.

Lack of intimacy as a factor in depression. (UNCC Summer Grant), 1984, $1,750.

The physcially/sexually abused female inmate: Her crime and its relationship to her early history. An intensive intervention strategy introduced at the North Carolina Correctional Center for Women. Z. Smith Reynolds Foundation, 1984, $32,600.

The effects of prison housing on the psychological well-being of the female inmate. (UNCC Summer Grant), 1986, $1,950.

The use of the psychodidactic treatment model for physically/sexually abused female offenders in community and institutional coirrectional settings. Treatment program implemented at Fountain Correctional Center and Re-Entry, Inc. Funded by the Z. Smith Reynolds Foundation, 1986-1987, $30,000.

HONORS AND AWARDS

1982 William K Boardman Award for Outstanding Clinical Psychology Graduate Student.
University of Georgia, Athens, Georgia.

1981 University-Wide Assistantship
University of Georgia, Athens, Georgia.

1980 Award for Outstanding Graduate Student Research
Association for the Advancement of Behavior Therapy

1977 Graduated Cum Laude
University of North Carolina at Chapel Hill

1977 Psi Chi, Psychology Honor Society
University of North Carolina at Chapel Hill

1976 Phi Beta Kappa
University of North Carolina at Chapel Hill

PROFESSIONAL AFFILIATIONS

American Psychological Association, Member

Southeastern Psychological Association, Member

American Correctional Association, Member

North Carolina Correctional Association, Member

Psychological Health Care of North Carolina, Member

LICENSURE

1982 Licensed in North Carolina as a Practicing Psychologist

1988 Fellow and Diplomate
American Board of Medical Psychotherapists

ATTACHMENT
GREGORY THOMPSON EVALUATION
DOCUMENTS REVIEWED AS OF 7-22-99

July 15, 1999 Deposition Testimony Theodore H. Blau, Ph.D.

1999 Clinical Testing Data of Theodore H. Blau, Ph.D.

April 6, 1999 Psychological Report of Theodore H. Blau, Ph.D.

November 18, 1994 Affidavit of Gillian Blair, Ph.D.

November 21, 1990 Affidavit of Brock Mehler, Investigator and Mitigation Specialist

Post-Conviction Hearing Testimony of: Gillian Blair, Ph.D.
Mr. Mike Bryant, Vocational Instructor at RMSI
Ms. Cheryl Donaldson, counselor on RMSI Death Row

1999 Deposition Testimony of: Ms. Teresa Martin
Ms. Sherry Diane Carter Bertok Downs
Mr. Jeff Colonge
Dee Lambert, Ph.D.

August 14, 1985 Deposition Testimony of Glen Watson, Ph.D.

May 27, 1985 Psychological Evaluation from Middle Tennessee Mental Health Institute

1985 Trial Testimony of: George Ellis Copple, Ph.D.
Sgt. Roy Phillips
Floyd Mack, Sr.
Ms. Cheryl Hammond
Ms. Geneva M. Woods
Ms. Maybelle Lamar
Mr. Doc Lamar
Mr. Curtis James Thompson
Mr. Earl Weaver
Mr. John Hall
Ms. Nora Jean Hall Wharton
Mr. John Hollis
Mr. Roy Hewgley
Ms. Arlene Cajulao
Mr. Jim Creighton

EXHIBIT
3
7-22-99 dfl

1985 Trial Cross-examination Testimony of Investigator Floyd

January 3, 1985 Handwritten Statement of Mr. Gregory Thompson

January 25, 1985 Statement of Steven Graves

January 27, 1985 and January 28, 1985 Statements of Jay Vickers

January 24, 1985 Tennessee Bureau of Investigation Synopsis of Investigation

January 2, 1985 Supplemental reports of Sgt. Hill and Sgt. Parker

January 3, 1985 Map drawn by Mr. Gregory Thompson

Tennessee Department of Corrections Administrative Policy No. 503.03

January 9, 1985 Statement of Sgt. Phillips, Tennessee Highway Patrol

Disciplinary decision reports on Mr. Gregory Thompson from 1985 to 1998.

Undated Letters apparently written by Mr. Thompson to: Arlene Cajulao
Sandy
Shine
Dearest Cupcake

Undated Song apparently written by Mr. Thompson to Sandy

Undated Poem apparently written by Mr. Thompson to Sandy

Note indicating that Sgt. Peggy Sawyer found a capsule and a letter from Mr. Thompson to Sandy and indicating that all letters to Sandy were provided to the State on or about July 15, 1985

Extract of Mr. Gregory Thompson's U.S. Navy records taken from trial counsel's file, post conviction hearing Exhibit 3

April 20, 1988 Pro se Petition for records written by Mr. Gregory Thompson

August 14, 1995 Pro se Motion and Affidavit filed by Mr. Gregory Thompson to drop all further death penalty appeals

Suppression Hearing Testimony of: Mr. Gregory Thompson
Lt. Graham

S.A. Eubanks
D.A. Charron

Transcript of proceedings concerning Mr. Thompson's request to participate in his trial

July 1985 Motion to allow the Defendant to participate at trial

Supplemental motion for psychiatric examination and neurological examination

Pages 1-6 of the February 27, 1989 Tennessee Supreme Court Opinion on direct appeal outlining the facts of the case

Tennessee Department of Corrections Medication Records for Mr. Gregory Thompson continuous 1986 to February, 1999

Tennessee Department of Corrections Administrative, Medical, and Mental Health Records for Mr. Gregory Thompson continuous 1985 to February, 1999

ATTACHMENT

"E"

G-F-W Auditory Selective Attention Test

Category Test

Kaufman Neuropsychological Assessment Procedure

Luria Memory Test

Reitan-Indiana Aphasia Screening Test

Rey-Osterreith Complex Figure Test

Trailmaking Test (A & B)

Word Generation-F/A/B

Finger Oscillation Test

Wisconsin Card Sorting Test

5. The results of these tests indicate that Mr. Thompson suffers from significant auditory processing deficits. In addition, Mr. Thompson demonstrates impaired simple concentration, attention and mental flexibility as well as an abnormal variation between dominate and non-dominate finger oscillation.

6. While these results provide indicia of organic brain damage, Affiant's clinical observations and review of pertinent background material suggest that such organicity is secondary to other mental impairments.

7. It is Affiant's clinical impression that Mr. Thompson suffers from a major mental disorder/ thought disorder, to wit, that he suffers from schizoaffective disorder-bipolar subtype with organic components.

8. Persons suffering from schizoaffective disorder-bipolar subtype demonstrate episodes of delusions, hallucinations, disorganized speech (e.g., frequent derailment or incoherence), and/or grossly disorganized or catatonic behavior concurrent with a major manic or mixed episode or such an episode together with a major depressive episode. Onset of the disorder typically occurs in early adulthood.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

GREGORY THOMPSON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

Case No: 4:98-CV-6
(Judge Edgar)

AFFIDAVIT

COMES NOW BARRY M. CROWN, Ph.D., and, being sworn upon his oath, states and affies as follows:

1. Affiant is licensed psychologist in the State of Florida. Affiant's curriculum vitae is attached hereto as Affidavit Exhibit A. A list of all cases in which Affiant has testified at trial or in deposition within the past four years is attached hereto as Affidavit Exhibit B.

2. Affidavit has been retained by counsel for Petitioner, Gregory Thompson to render an opinion regarding Mr. Thompson's mental health. A statement of the estimated compensation to be paid to Affiant for his study and testimony is attached hereto as Affidavit Exhibit C.

3. Affiant has reviewed voluminous background materials regarding Mr. Thompson which have been provided to him by counsel for Mr. Thompson. Such materials are available for inspection and/or copying upon request.

4. Affiant has conducted a clinical evaluation of Mr. Thompson including the aforementioned review of materials, a clinical interview, and the administration of the following test instruments:

Shipley Institute of Living Scale

RESPONDENT'S EXHIBIT 3

Further Affiant sayeth naught

Barry M. Crown, Ph.D.

STATE OF FLORIDA)
)
COUNTY OF DADE)

Subscribed, sworn to and acknowledged before me by Barry M. Crown on this the 20th day of July, 1999.

NOTARY PUBLIC

My Commission Expires:

7-9-2001

BARRY M. CROWN, Ph.D. PENTHOUSE SUITE 310 7800 RED ROAD SOUTH MIAMI, FLORIDA 33143 (305) 665-0771

EDUCATION

Ph.D. Florida State University, 1969
Post-Doctoral Fellow in Psychiatry (Psychology), Harvard Medical School, Massachusetts General Hospital, 1969-1970

CERTIFICATIONS

Licensed Psychologist (PY 002131), Board of Psychological Examiners, State of Florida
Certified Psychologist, Florida Association of Practicing Psychologists
Diplomate, American Board of Professional Neuropsychology
(Chair, Examinations Committee, 1994-1998)
(President-Elect, 1998-1999)
Diplomate, American Board of Forensic Examiners
Diplomate, American Board of Forensic Medicine
Diplomate, American Academy of Pain Management
Certified Addictions Specialist, American Academy of Health Care Providers in the Addictive Disorders

ADDITIONAL TRAINING

Forensic Psychology, American Academy of Forensic Psychology
Family Therapy, Institute for Juvenile Research, Chicago
SPECT Brain Imaging, Medical College of Wisconsin

ACADEMIC APPOINTMENTS

Courtesy Professor of Psychology
Florida International University

Adjunct Associate Professor of Psychiatry
University of Miami School of Medicine

PREVIOUS ACADEMIC APPOINTMENTS

Boston University; University of Illinois School of Medicine

OTHER EXPERIENCES (SELECTED)

Research Coordinator, Governor's office, State of Florida
Clinical Director, NIMH National Drug Abuse Training Center
Associate Director, National Council on Drug Abuse
Co-Director, Child Abuse Project, University of Miami School of Medicine, Jackson Memorial Hospital
Head, Neuropsychology Group, Miami Children's Hospital

PROFESSIONAL MEMBERSHIPS

American Psychological Association; Southeastern Psychological Association; Florida Psychological Association; American Psychology-Law Society; American College of Forensic Psychology (Fellow); National Academy of Neuropsychology; American College of Professional Neuropsychology (Fellow); American Academy of Neurology (Affiliate); International Neuropsychological Society; Society of Behavioral Medicine; Society of Nuclear Medicine; American Society of Neurorehabilitation; Royal Society of Medicine (Fellow); British Psychological Society (Foreign Affiliate); Royal Society of Health-London (Fellow); American Association for Marital and Family Therapy

Barry M. Crown, Ph.D.

I have made a reasonable attempt to gather this information. My records are not kept by date nor are litigation cases kept seperate from other clinical cases.

Cases involved (trial/deposition) during the last five years...

Stout v. Bratt, Limperis, & Holy Cross 90-31776 07
Morales v. Outtens 91-45426 CA 09
Wood v. Ring 92-1308
Carlisle v. Carlisle 91-51479 CA 29
Gonzalez v. Prestressed Systems 92-006565 (25)
Estate of Anna Maria Correa, Deceased 90-4966 (01)
Carter v. Amble Inn Motel & McCumber 92-32254 (07)
Estrada v. Coral Gables & Kinney 91-51853 CA 01
Perry v. Laidlaw Waste Systems 92-1442 CA 10
Doe v. Republic Health Corp. et al. 91-36709 CA 15
LaFontaine v. Otis Elevator, et al. 92-05019 (06)
State v. Thanh Le 93-3162-K
Gonzalez v. Parkview Pt. Condo Assoc. 051-75-4434
Reynoso v. Gold Coast Aerial, et al. 92-15911 CA 11
Pierre v. Naples Community Hosp. 90-3317 CA 01
State v. Bates 92-681
Warsing v. USA S. Dist. FL-Civ-Marcus
Carlson v. Brown, Fountain Engineering 95-02868 CA 15
Vernet & Vincent v. Univ of Miami, et al. 93-1602 CA 28
Caceres v. Zubi Supermarket 93-10392 (20)
Gordon v. Shanfield
Corcoran v. Salcheck 94-4364 (11)
Portanova, et al. v. Coca Cola, et. al. 94-02499 04
State v. Aldrich 95-489F
State v. Zakrzewski 94-1283-001
Pruitt v. Zolfaghari 92-01940 28
Brompton v. Poy-Wing 94-04311 (08)
Cohen v. Lewis 95-16490 (CA01)
Scheu v. Mendez 95-000084
Wouters v. U-Haul 95-11940 CA 21
Canale v. CAC Ramsey 93-18837 CA 15
Abreu v. Korst of Calif 033-60-3358
Morris v. Riverside 95-0914CA
Torrillon v. Granitz 94-0812109
Brown v. Wall 94-16284 CA 08
Taylor and Ray v. Public Health Trust, et al. 92-24060(24)
Vallescura v. Dube et al. 95-23758 CA 15
Chery v. First Property 94-03124
Varnum v. Miami Management 95-005648 11
Espinosa v. Grasmick, et al. 95-000615; 95-000618
Hodge v. Shands 92-4172-CA
Ewing v. Sellinger & Andersnn 92-5998 AD
Ewing v. Brown 94-482 AD
Judd v. St. Jospeh Mercy Hospital, et al. 97-549906-NH
Pascale v. Federal Express 94-010939 (06); 95-006911 CA 14
Epstein v. Zim American 97-3565-CIV-UNGARO-BENAGES

Exhibit C

Fee Schedule
$250 per hr records review, conferences
$350 per hr depositions, court appearances, including transit

ATTACHMENT

"F"

TENNESSEE DEPARTMENT OF CORRECTION 0000094 FOUR

PROBLEM ORIENTED - PROGRESS RECORD

AME:_____ NUMBER_____

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Riverbend Unit 2
Patient: Thompson, Greg
Medical record #: 108408

Note Date: 5/1/94
Note Printed on: 5/1/94 at: 12:57:41 PM
Treatment Day 669

Patient reports stable interval, though he feels more preoccupied with "his past." No reports of auditory or visual hallucinations. No difficulties with medications except for dyspepsia which is relieved with evening snack. Overall he has done quite well during the time that I have been treating him (7/92 till present) despite a significant history of psychosis requiring multiple medications.

Medications	Route	Days on Med	Days on Dose	AM	Noon	PM	HS	Comments
Mellaril	PO	669	669	0.00	0.00	0.00	100.00	

Axis	Diagnosis
1	Bipolar disorder

Service Provided
Medication

Duration
15

ROBERT HOEHN, MD

ATTACHMENT

"G"

2A218

TENNESSEE DEPARTMENT OF CORRECTION

MENTAL HEALTH TREATMENT PLAN

0000228

Inmate: Thompson, Greg Number: 108406 DOB: 12/64 Sex: M
(Last, First, Middle)

Referral Date: 1989 Facility: RMSI Treatment Status: Vol. Custody Status: Med

Assigned Treatment Program: Outpt. Treatment Plan Formulation Date: 3/94

Initial Treatment Plan: _____ or, Updated Treatment Plan: ✓

Presenting Problem: H/O of A.H., paranoid ideation

DIAGNOSIS

Axis I: 295.30 Schizophrenia, paranoid type
R/O _____

Axis II: V71.09 NONE
R/O _____

Axis III: NONE
R/O _____

Axis IV: 4

Axis V: 75

Rationale for Treatment Continuation: Continued symptoms

RECOMMENDATIONS	NEED(S)	REFERRAL
PSYCHOSOCIAL		
CHRONIC MEDICAL	None at this time	
HOUSING		
JOB ASSIGNMENT		
DISCIPLINARY		
OTHER (SPECIFY)		

Original: Inmate's Health Record
Programmatic Record
Warden

CR-3326 (Rev. 4/92)
Page 1 of 2 Pages

RDA 1458

TENNESSEE DEPARTMENT OF CORRECTION 0000229

MENTAL HEALTH TREATMENT PLAN

Treatment Period 3/94 To 3/95

PROBLEM	3 MONTH TX GOALS	6 MONTH TX GOALS	MODALITY/ FREQUENCY	DATE GOAL MET	PROVIDER
AH VH	↓ A+VH	Maintain ↓ A+VH	Pharmacotherapy		Puett, M.D.
			Psycho-therapy		Rutter, M.D.

Signatures: Inmate Greg Thompson Date: 108406

Comment(s): _____

Staff: Ind Tolmoyer Date: 3/16/94

Michael Rutter, M.S. Date: 3/16/94
Mental Health Professional(s)

Puett, MD Date: 3/16/94
Psychiatrist/Physician

Receiving Facility Provider: _____ Date: _____

Continue Current Plan: _____ Modification: _____ New Plan Required: _____

Original: Inmate's Health Record
Programmatic Record
Warden

CR-3326 (Rev. 4/92)
Page 2 of 2 Pages

RDA 1458

ATTACHMENT

"H"

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER: 108406

FORMAT: Problem Number and Title:

S - SUBJECTIVE O - OBJECTIVE A - ASSESSMENT P - PLAN

Date	Prob. No.	Code	
5/30/86			Examination W/K CPE Oriented X3
6/6/86	6		10 ODD superficial cuts on inside R/L arm cleaned & bandaged. Multiple healed, made surface cuts - I - Inmate states he will not cause T Tot AT this time. Will continue to observe
6-10-86	20	S	Multiple superficial lacs to R wrist & upper arm
		O	Pupils Eye to (R) wrist X 2 with second attempt appx. 3" long to subdermal & tissue
		A	Stiff inflicted lacs
		P	C.P.C. lac cleaned & bandaged - First aid rendered as above - admit to WIDU Dennis Hughes M.D.
6/10/86 10:40 pm			Pt. admitted to WI-10U per Dennis Hughes M.D. orders @ pt's request. 3" long full thickness slashing stiff applied plaster splints after dressing wounds of both wrists & pt placed in padded observation room. See nursing notes. Alan Gabbert RN
12-3-86			Patient case conference held on WI-10U on 6-20-86 per quarterly review on 6-20-86 at Shawnee Gail Gabbert

Do Not Write on Back CR-1884

TENNESSEE DEPARTMENT OF CORRECTION

EMERGENCY ROOM CARE

Date: 6/6/86 Time: 6 30 pm
Unit & Cell No. 13-1

Name Thompson Kay Number 105406

Physical Findings: (T)___(P)___(R)___(BP)___

Date of Last Tetanus Shot: X 1 yr. Tetanus Toxoid: Yes___ No___

Chief Complaint: Several superficial cuts on inside of (R) arm.

History: Has previously spoken w David Hoyt.

Special Exams: _____
(X-Ray) (EKG)

(Lab Work)

Diagnosis: _____

Treatment: Cleaned, Bacitracin ointment & bandage

ORDERS: 1. _____
2. _____
3. _____
4. _____

Person Notified and Time Called: David Hoyt 6:35 pm

Disposition: Back to unit I.

Transferred to: _____

Admitted to: _____

Discharged: _____ Time: _____ Date: _____

Instructions to Patient: _____

Patient can return to: Unit.

Patient will be followed: Yes X No__ When & Where by psych.

Danielle Hargrove
(Signature of Attendant or M.D.)

White - Health Record

TENNESSEE DEPARTMENT OF CORRECTION

EMERGENCY ROOM CARE

Date: 6-10-86 Time: 12:45
Unit & Cell No. 1

Name: Thompson, Gregory Number: 108406

Physical Findings: (T)___ (P)___ (R)___ (BP)___

Date of Last Tetanus Shot:_____ Tetanus Toxoid: Yes____ No____

Chief Complaint: Cut R wrist - Left neck lacerations

History:

Special Exams: (X-Ray) (EKG) (Lab Work)

Diagnosis: Self inflicted lacerations R wrist Left side of neck

Treatment: Cleaned & Sutured, Bacitracin ointment Applied, Sterile Dry dressing

ORDERS: 1. Sick Call as ord.
2.
3.
4.

Person Notified and Time Called: Davide Hyde

Disposition:

Transferred to:

Admitted to:

Discharged: ✓ Time: 12:55 p Date: 6-10-86

Instructions to Patient:

Patient can return to:

Patient will be followed: Yes ✓ No__ When & Where

Hyde Metton Lee
(Signature of Attendant or M.D.)

White - Health Record

TENNESSEE DEPARTMENT OF CORRECTION

EMERGENCY ROOM CARE

Date: 6-10-86 Time: 12:45
Unit & Cell No. 1

Name Thompson, Gregory Number 108406

Physical Findings: (T) 98 (P) 80 (R) 18 (BP) 140/90

Date of Last Tetanus Shot:_____ Tetanus Toxoid: Yes____ No____

Chief Complaint: Cut wrist of (R) arm

History:

Special Exams: (X-Ray) (EKG) (Lab Work)

Diagnosis: 2nd Self-inflicted lacerations to (R) wrist approx 5" long to back of wrist

Treatment: Cleaned with betadine w/ S.R. Plaster splint applied after sterile gauze pads were placed to wrist. Pt. was taken to Dr. Hyde's office. Unable to reach Dr. Davis's office

ORDERS: 1. Admit to W100 - per Daniel Huff
2. Suicide Precautions
3.
4.

Person Notified and Time Called: Cpl Mathews

Disposition:

Transferred to:

Admitted to: W 100

Discharged:_____ Time:_____ Date:_____

Instructions to Patient:

Patient can return to:

Patient will be followed: Yes ✓ No__ When & Where 6/10/86 Hospital W-100

Hyde Metton Lee
(Signature of Attendant or M.D.)

White - Health Record
Copy - File

CR-2005

TENNESSEE DEPARTMENT OF CORRECTION

ACCIDENT/TRAUMATIC INJURY REPORT

Name of Person Injured Thompson, Gregory 108406
Last First Middle Number

Employee ____ Inmate/Student ____ Visitor ____

Institution where Accident/Injury occurred TSP

Location within Institution where Accident/Injury occurred Unit E

Date of Injury 6-10-86 Time of Injury 12 05 PM

Date of Treatment 6-10-86 Time of Treatment 12 PM 12 PM - 1 PM.

Subject's Version of Accident/Injury Inj. left hand [illegible]

Witness/Third Party's Version of Accident/Injury, if any ____

Weapon, Property or Equipment involved ✓ Yes ____ No

If yes, specify Unknown.

Description of Injury/Diagnosis [illegible]

Disposition: (Check one) ✓ Treated by Institutional Health Personnel

____ Transported to Community Health Care Facility for outpatient treatment only
List Facility

____ Transported to Community Hospital for Inpatient Treatment
List Facility

____ Other - Explain ____

Did Death result from Accident/Injury? ____ Yes ✓ No

Signature of Examiner Hazel Shelton Date 6-10-86

Title LPN

Original: Health Record
Copy: Clinic File
Director of Health Services via Warden/Director

CR-2592 (Rev. 1/84)

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER: 108406

FORMAT: Problem Number and Title:

S = SUBJECTIVE O = OBJECTIVE A = ASSESSMENT P = PLAN

Date	Prob. No.	Code	
6/10/86			C/o smoke bite on fingers + c Lt.
I/M			No wounds apparent.
		A	Deferred.
		P	Observe F.U. by psych [illegible]
10/6/86			Psychiatry Inmate seen. Very difficult to interview as pt makes frequent statements which are disconnected + make only fragments of sentences. States he stopped taking Li because he was afraid it would bind in his pockets. Denies thinking he might die soon. Mood dysphoric, affect constricted to limited range. Pt denies any SI/HI. Pt denies any hallucinations. MSE & Hx are consistent with thought disorder, ? schizophrenia, paranoid type. Pt has had difficulty obtaining Li because of his refusal to cooperate with blood tests. Pt denies any complaints + medication is stable I have encouraged pt to be in contact if he is not in immediate danger + therefore I have not contacted. He states would like psychiatric today (earlier than usual). He may need to be changed antipsychotic meds. F/U 2 wks Dian Hoy

Do Not Write on Back

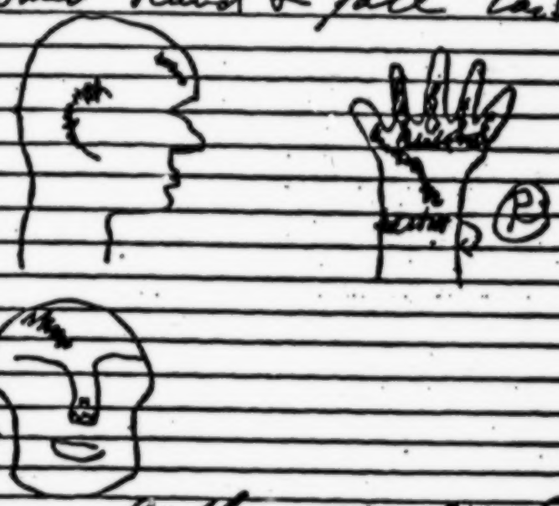
TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson Gregory NUMBER: 108406

FORMAT: Problem Number and Title:

S = SUBJECTIVE O = OBJECTIVE A = ASSESSMENT P = PLAN

Date	Prob. No.	Code	
9/16/89 0700			Burned hand & face last P.M.
			
		O:	Large Bullae circling (L) wrist Post. (L) hand. Post. Five digits. None on palms.
			Smaller Bullae + Vesicle Rannie and (R) Groin. Has Full Flex-Ext of hand.
		A:	2° Burn Post (R) hand + Groin
		P	Cleaned. Silvadene + Bulky dressing. Recek x 24 hrs.
			Keep to room temp. Pt. Pt. Clayton

Do Not Write on Back

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TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER: 108406

FORMAT: Problem Number and Title:

S = SUBJECTIVE O = OBJECTIVE A = ASSESSMENT P = PLAN

(Cont.)

Date	Prob. No.	Code	
10-31-89 9:30 AM RMSL			it was difficult to further assess his MS. He did appear to be a periodic loosening of associations, he appears oriented, though they fo difficult to fully determine. He officer on Unit reports that he has refused work as he is not strong enough, does not want to be labeled as a malingerer, and thinks he will be able to work. He reports that he has been quiet for the majority of the last three days. Allowed officer to contact Ortho surgeon, as needed and to convey their request to wear splint. Will refer to Dr. Peele on 11-1-89. — Michael Sutton, MS
11-1-89	12	S)	(Serious) compression) x 3 days)
		O)	(Serious) re-expansion noted; (thickening), nasal discharge into throat (edematous, weight)
		A)	(Decreased) Function
		P)	See Orders) — ... — Signed: [illegible]
11/1/89 4pm			PSYCHIATRY Mr Gregory is one of the most difficult men I have had to supervise. I believe he has many abilities that he is unwilling to be witnessed, but was easily accessible. He refuses to work especially when he is around together. He is not very positive about himself as a person and has a tendency to be a picker of Michael Sutton's "Broken Men." He would not be psychotic but may be, but the concern on his I still that it is the same type who he is doing received and that is why he is. He agreed a lot of Staff projects and counselors like his work and while he is he may be close to be on the unit Hearing SS a AF and agreed on medication dose if will be I will adjust to have more alone and he is alright to remain that of his need to maintain the on Friday. — Rick

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Roy Deal, M.D. 11/17
Psychiatric Consultant
Riverbend Maximum Security Institute
Mr. Greg Thompson
Unit 2
Prison #:108406

Mr. Thompson is a 30-year-old black male last interviewed by me approximately 2 weeks ago. At that time he was noted to be displaying active evidence of psychosis and mania with marked grandiosity and delusional thought content. He stated that he had written many of Michael Jackson's previous songs and was a millionaire, and a great inventor as well as a famous writer and artist. At that time he also had very pressured and rapid speech with marked tangentiality and looseness of associations. It was difficult to assess, but felt at the time he was possibly responding to auditory hallucinations and appeared to be actively psychotic. He was however making no threats of self harm or representing any aggression towards other individuals and declined to take medication voluntarily. He did not meet the criteria for involuntary medication.

On 11/15/88 he spoke to one of the nursing staff, Ms. Phyllis McEver, RN and informed her that he was willing at that time to take medication. He was ordered Trilafon 8-16 mgs. pobid as he would take it, Lithium 300mgs. pobid and Klonopin 1mg. pobid. Since that time he has refused to take the Lithium, but has taken Klonopin and Trilafon.

On our exam today he states that the medication has helped him to slow his thoughts down, begin to be able to write music once again, and his mental status was very remarkably altered. He shows no signs of eps or excessive sedation, but his speech was less pressured, less rapid, and somewhat more goal directed. He does however remain very tangential and grandiose and continues to proclaim himself as an inventor of the ethanol car as well as a song writer for Michael Jackson and numerous country-western musicians. He continues to display some irritability directed towards the other inmates and staff as well as continued obsessional thoughts of hyper-sexuality, he does however notice a decrease in these since beginning on the medication.

On interview he was also somewhat guarded about this, but did relate 2-3 episodes of severe depression in the past at which time he will become tearful and withdrawn. This states that he prefers to be "hyperactive" and did not wish to discuss the depressive periods of his life. My impression of this individual is that he most likely has a bipolar affective disorder and continues to be very grandiose and hypomanic. I do believe his active psychosis with the exception of his delusional thought content is resolving, and wish to continue him on Trilafon 8mgs. poqam, 16mgs. pohs, as well as Klonopin 1mg. poqam and 2mg. pohs. I have discontinued the Lithium since he does not wish to take this at the current time. He will be followed on a 2-3 week basis and no other changes will be made at this time.

R.W. Deal MD

(...SEE DEPARTMENT OF CORRECTIO...)

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER: 108406

FORMAT: Problem Number and Title:

S = SUBJECTIVE O = OBJECTIVE A = ASSESSMENT P = PLAN

Date	Prob. No.	Code	
12/7/88		S)	Psychiatry c/c initial evaluation. Nervousness. Want to be seen or sick call for more
		O)	Calm, cooperative (superficially), somewhat distractible, speech soft & non-pressured. Affect is somewhat guarded and inappropriate; he appears to fighting back tears on 2-3 occasions. He continues to be somewhat delusional and now reports that he had to fight a great war earlier this year, a war between good and evil which he won, making "everybody happy." He is still paranoid beyond delusional [illegible] some of the "people are people to work with ... but they don't treat it today ... I can't understand that." Reports feeling that the officers were "aliens" [illegible] it turns this to past, but denies that now. He does not report (and seems to deny) auditory hallucinations. That he learned the game shuffle today. He continues to experience AM of a muffled quality and will ask "a woman who has to talk to me and it hurts to talk to me." His thought is generally coherent & goal directed, he occasionally is tangential or overinclusive in [illegible]. I thought it also important to get 3 to report [illegible] [illegible] of [illegible] stuffiness which keeps him from being on a full "fighting mode."
		A)	Schizoaffective disorder, partially controlled on medication. Feeling more frustrated.
		P)	Continue current meds, add lorazepam to attempt to boost effects of [illegible] make [illegible] regulate sleep.

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
1/6/91	11:45		Psychiatry Chart reviewed, medication renewed. S. Humble MD
1/13/91			Psychiatry S) Mr. Thompson c/o chronic episodes of SOB when he does fast. Chest x-ray, EKG after 5 minutes and then go away. Physical exam shows septal deviation, left chest in CTA + wheeze, thoracic, no rales, No stridor, Heart RRR + MRG. MSE WDX 3. Discussed reasons for imprisonment and sentence and feelings of depression which he feels are related to life situation. Flat affect in general appearance well groomed and appropriately aggressive. A) Asthma, resolving vs a psychiatric problem. Probably is a stress effective, partially controlled on medication. Possible plan epinephrine. Need PE. P) Continue current medication, see q one mo. STEPHEN HUMBLE, MD S. Humble MD
1/23/91			Asthma (1) Will f/u Loryfrin to maximal aerobytic response and control pain symptoms. (2) Will consider need to taper off of PC meds on 2nd visit if good control can be maintained for 6 more months. S. Humble, MD

Do Not Write on Back STEPHEN HUMBLE, MD CR-1884

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson Greg NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	

TREATMENT DAY 298
MEDICAL RECORD # 108406

DATE: 4/25/93
PATIENT: Thompson, Greg
MEDICATION REVIEW for 10 minutes
TREATMENT FOCI
Patient continues to do very well. During this session he recounted his psychotic symptoms that he experienced including feelings that the guards were aliens sent to destroy the earth and that snails and fish were in his cell eating his body. No such delusions remain though he at times wonders what was real. He currently has no auditory hallucinations, persecutory delusions or vegetative symptoms. Affect is mildly increased but in good control. AIMS recorded. No difficulties with medications. Continue with current doses.
MEDICATIONS
MELLARIL 100.00mg qhs

Robert Hoehn, MD

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(Rev. 8/90)

TENNESSEE DEPARTMENT OF CORRECTI.

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Gregory Thompson NUMBER 108406 RMSI

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
5/1/95	1:15 pm		Psych - RMSI (seen in Infirmary) Hx of BPAD, bipolar I disorder, manic, delusional, grandiose, irritable, "reality is relative", "I'm trying not to die", "I'm not that in between name", "I'll stop myself, count", "prefer happy, settle mixed, sleep ok, still thin, slowed, wt. loss, decision change, thinks a little impulsive, ↓ focus, delusion of writing most of the songs on the radio, speech ok pressured, ↓ euphoric affect, would like something to help him sleep, compliant to inpt. mood stabilizer, antipsychotic therapy
			BPP: will add Risperdal 1mg po QHS per pt. request, continue Depakote 1 mg/kg/d (@ 6 mg/kg/d) Trileptal 600 mg po BID, monitor LFTs, CBC, Depakote level currently mania & delusional, not at acute risk of harm to self or others yet
5/1/95	11:15 pm		Psych - RMSI Chart reviewed, orders signed
5/2/95	2:20 pm		Psych - RMSI chart reviewed, orders signed
5/3/95	11:15 am		Psych - RMSI Chart reviewed, orders signed
5/4/95	8:30 pm		Psych - RMSI Chart reviewed, orders signed

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884 (Rev 8/90) RDA-1458

TENNESSEE DEPARTMENT OF CORRECTION RMSI

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Gregory Thompson NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
5/7/95	7:10 pm		Psychiatry - RMSI (seen in Ad Infirmary) Hx of BPAD, manic - pt. escalating, but currently in control of his behavior, will give pt. Valium 10mg to help sleep, continue to encourage neuroleptic or mood stabilizer, watch closely for actions or delusions (Merritt MD)

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884-1684 (Rev 8/90) RDA-1458

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Gregory Thompson NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
5/6/95	4[illegible]	S.	officer CO Pt. between
4-2		O.	While the nurse [illegible] and 4-2
4208			officer Bert brought to the nurse station
RMIS			that Mr Thompson for past 2 weeks has
			"constantly" been on call light. Officer
			Bert & Cpl Grainger state that Pt.
			complains that his cell is "contaminated"
			and his cube is full of contamination
			and he wants his mattress and [illegible]
			out of room. Officers state that Pt.
			"acts up" between the hours of 4pm
			-5:30 every morning. Officer Bert states
			that Mr Thompson & the "rats are"
			and is convinced he "may go off"
		A.	Same above. Poss Psychosis
		P.	Return to Chair for review Ch. chart
			and [illegible] for orders. Tx of symptoms
		I.	Review chart and assist PRN [illegible]
		E.	Incomplete
5/22/95	9:30	S	Pt. states "he isn't crazy and never has
2 days	to		been — his problem is caused by the radio
	5:15 pm		waves and radiation from (his neighbor's) electricity
			Pt. was getting out of shower & "decontaminat-
			ing" himself. All of pt's clothing, mattress
			& bed possessions piled in front of his door to
			be "decontaminated" Pt. reports he can see static
			electricity all around his cell and that he is being
			charged by static electricity which is making him
			stronger. When I asked pt if he is hearing voices
			at present pt states "not since this writer last saw him in January"

Cont. next page

Jenny Wilds RN

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PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
5/22/95	4:30	Cont.	Pt. compared his changes of electricity to
2 days	to		that of the electric chair — "If you were in the
	5:15		electric chair you would feel the electricity go
			through you — that's what I mean about de-
			pression." Maintained eye contact during conversation
		A	Manic behaviors
		P	Contact psych for orders
		I	Discussed w pt that maybe he would feel
			better in another cell — pt refused. Also
			refused Phillasil at this time
		E	Pt agreed to wait 0 hrs this writer to talk to
			MD to see if he could be affected by electricity
			from radio. Jenny Wilds RN
5/23/95	6:00		Discussed above w Dr Powell & order received
			to admit pt to infirmary observation room and
			he will see pt this am. Restraints is
			available to move pt safely in view of his
			pt hx of being combative — Jenny Wilds RN
	6:10		Pt to bed fully clothed — equipment — WC chair, security
			of above order. Jenny Wilds RN
	8:00		Pt moved to infirmary & placed in observation
observation			cell. Flow has pants tie up & shoe
cell			strings. All verbal responses appropriate
			@ present. Positive eye contact. Constant
			movement. Requesting hygiene items &
			tobacco products. Advised to wait
			until MD arrive and could discuss
			these items. E mb. Flow verbalized understand
			and calmly walked away from desk
			Brenda Hearn

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584 (Rev 8/90) RDA-1458

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TENNESSEE DEPARTMENT OF CORRECTION 0000111

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
12/14/95	7p		Walking around cell. Good eye contact. Very quiet (at times a blank stare) mood: flat affect restricted, flat. All verbal responses appropriate. Waiting for Dr. Pruitt to come in to see Bertha Hunt
	10A		Pacing more. Took cup off door from officer. Very blank stare. Will continue to monitor. — Bertha Hunt
	11A		NAD in assessment area — Bertha Hunt
	12P		Rapidly pacing in cell. Waiting for Dr. Pruitt to come. Will continue to monitor — Bertha Hunt
	1P		Flashing light on staff in cell to gain power, flow of thoughts very rapid. Becoming agitated. Refused coffee from officers stating he no longer needs that, yet gave up to Dr. Pruitt advised it is on his way in to assess — Bertha Hunt
12/15/95	4p		Medication was given as ordered Thorazine 200 mg Dr. Pruitt Orders. Pt calm but appears to be little depressed. Will continue to monitor pt's response to meds & condition — Bertha Hunt

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TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
12/14/95	2PM		Psychiatric - BMHI (seen in infirmary) Pt is a BF dx'd DID previously treated at Bellevue Manor DID who stopped his medication 2 days ago because it would slow him down on the unit. Pt. was noted to be more productive, more hypomanic since 4pm but has continued to refuse meds until 5pm when he agreed to take only Valium 10 mg @ night. This was given for 48 hrs. It was described this AM as becoming increasingly agitated this AM stating that he knew what his problem was; it was that for the last 5 years he had been listening to the radio for 24 hrs/day & was told to divorce his wife. Pt. was taken to the infirmary and remained calm until noon, & became progressively more agitated & paranoid seeking the lights were radiating him. Upon exam pt. was markedly agitated pacing, hyperverbal, pressured speech and demanding to talk to the MD alone with officer, locking and nothing the door when this was not done. A/P: BPD, organic - pt. to be transferred to special needs. Dr. Mayer agrees to accept with medications pt. on transfer 8 Haldol 5mg / Benadryl 50 mg / Ativan 2mg IM to de psychosis and agitation. Emergency medication form signed as pt refusing meds and in lacking capacity to make this decision as with no psychosis a danger to himself and others. Bertha Hunt, MD

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-1884 (Rev 8/90) RDA-1458

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TENNESSEE DEPARTMENT OF CORRECTION 0000170 RUSI

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
11/6/95	1500		Psychiatry - RMSP (Initial)
			33 yo B/M c Dx of BPAD Rapid Cycling. Was seen in MSU, pt. was busy when medication was offered. Noted talking to staff & other pts. on unit. Noted pressured speech, psychomotor activity. States he realizes that is something wrong with him, states he likes having fast thinking but does not want to go "over the limit", states he does not want to take Lithium every day because he has to be worried about getting stabbed in the back, agrees only to take Lithium intermittently. Will order Lithium, wants EKG results.
			A/P: Decreasing manic symptoms - agrees to take Lithium, needs Lithium level. Pt. is not at a point where he can be involuntarily medicated, will continue to observe, Tegretol d/c'd.
			(illegible)

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CR-1884
(Rev. 8/90)

ATTACHMENT

"I"

Order Form 1298/A5 (8-Copy set)
Order Form 1298/5 (8-Copy set)

0000067

PHYSICIAN'S ORDERS

NAME Thompson, Gregory
ROOM NO. (ADDRESS)
HOSP. NO. RMSI JA 208
PHYSICIAN 108406

Drug Allergies NKA

Date & Time	Another brand of drug identical in form and content may be dispensed unless checked ☐	DO NOT USE THIS SHEET UNLESS A RED NUMBER SHOWS → #	Nurse's Initials
2/2/95 1P	Give pt 2 capsules of TCN 500mg + instruct to make a paste & Otte + apply to Tongue tid X 5days (3 cups should last 5 days) Tetracycline Capsules		
	Ci Cummings 2/3/95 CLINTON CUMMINGS, M.D.		
	Rec'd on mar 2/2/95 Kathy McClemore RN		
2/7/95 4:45PM	1. Tylenol #4 ÷ PO q 4-6 hrs PRN pain x 24 hrs (Refax ☑ 2-7-95)		
	2. Pen VK 250 mg ÷ PO q 6 hr x 7 days.		
	2 Tylenol # 3 ÷ or ii q 4-6 hrs PRN pain x 24 hrs		
	3. Refer to Dental in AM C. Cummings M.D 2/7/95 CLINTON CUMMINGS, M.D.		
	Noted, Myra Nelson RN 7:10 PM		
2/10/95	① D/C Pen VK ecotrin		MAR
	② Tetracycline 250mg ÷ P.O. q 6 h x 7 days		MAR
	③ Tylenol #3 ÷ Tab p o q 4 h p.r.n. Pain x 3 days		MAR
	M. Burgess, DDS		
	Noted - MAP, Nursing Supervisor RN at 2p		

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TENNESSEE DEPARTMENT OF CORRECTION

0000047

Medication Administration Record

RMSI

Name Thompson Gregory Number 108406 Location JA208
LAST FIRST MIDDLE

Allergies NKA

Responsible Physician BOATRIGHT Month FEBRUARY Year 1995

START	STOP	MEDICATIONS
2/2/95	2/7/95	Tylenol #3 ÷ or ii PO q 4-6 hrs PRN pain x 24 hrs starting @ 8p Dr.:
2/2/95	2/9/95	Tetracycline 250 mg ÷ PO q6h x 7 days Dr.: Burgess
2/3/95	2/8/95	Cylert #3 ÷ BID PRN pain x 5 days Dr.: Burgess
2/7/95	2/12/95	Refax #4 po TID x 5 days Dr.: Boatright
		Dr.:
		Dr.:

HOUR: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

NURSES INITIALS	FULL LEGAL SIGNATURE	NURSES INITIALS	FULL LEGAL SIGNATURE	NURSES INITIALS	FULL LEGAL SIGNATURE
				NI	

R = REFUSAL
D/C = DISCONTINUED
N/S = NO SHOW
H = MEDICAL HOLD
CIRCLE BOX AND INCLUDE CODE/INITIALS

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TENN SEE DEPARTMENT OF CORRE ON 0000648

Medication Administration Record

Thompson, Greg (LAST, FIRST, MIDDLE) Number 108406 Location A-20P

Allergies

Responsible Physician Boatright/Thomas Month Feb Year 1995

START	STOP	MEDICATIONS	HOUR 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30
2/8	2/11	Actifed + P.O T.I.d x 7d Dr: Boatright KM	8 2 8
		Dr.:	
		Dr.:	
		Dr.:	
		Dr.:	
		Dr.:	

NURSES INITIALS	FULL LEGAL SIGNATURE	NURSES INITIALS	FULL LEGAL SIGNATURE	NURSES INITIALS	FULL LEGAL SIGNATURE
		KM	Kathy McClemore		
KM	Kathy McClemore				

ATTACHMENT

"J"

I TALKED HERE AND SEEN NO NEED TO SEE PSYCH SERVICES WHEN MOVED TO A DIFF. POD DR TO UNIT 1. REC'D A DISC. FOR THROWING PHONE AT OFFICER &

STAFF NAME: DONALDSON, CHERYL
TITLE: CORRECTIONAL COUNSELOR
SITE: RIVERBEND MAXIMUM SECURITY INSTITUTION
NOTE DATE: 04/07/1995 TIME: 14:00:00
NOTE: SPOKE W/OFFENDER AT JAIL/INSTITUTION- SEE COMMENTS

0000798

COMMENT:
I/M IS VERY HELPFUL TO STAFF, ON DOORS WHEN HE SHOULD BE WORKING, CELL IS NEAT AND CLEAN. P/T COMM. CLEANER WHO WORKS WELL. A JOVIAL FELLOW AND NEVER COMPLAINS WHEN TOLD TO DO SOMETHING. POLITE AND HELPFUL. WORKED HARD CLEANING PREPARING FOR THE AUDIT AND THIS WAS A GREAT ASSET TO THE UNIT.

BI01MAC TOMIS DATE: 05/14/1998
RMSI CONTACT HISTORY TIME: 10:04
DONACH01 FROM: 09/05/1992 TO: 05/14/1998 PAGE: 23

OMIS ID: 00108406 THOMPSON, GREGORY
STATUS: ACTIVE SEX: M DATE OF BIRTH: 12/13/1961
RACE: BLACK

STAFF NAME: DONALDSON, CHERYL
TITLE: CORRECTIONAL COUNSELOR
SITE: RIVERBEND MAXIMUM SECURITY INSTITUTION
NOTE DATE: 04/06/1995 TIME: 14:00:00
NOTE: SPOKE W/OFFENDER AT JAIL/INSTITUTION- SEE COMMENTS

COMMENT:
I/M CAME OUT TO MAKE LEGAL CALL BUT HAD THE TELEPHONE NU. WRONG. I/M REC'D 2 DISC. ON 4/5/95-1.DISRESPECT-CALLED FEMALE OFFICER BITCH AND EXCESSIVE USE OF CALL BUTTON. I/M REPORTS HE CAN NOT SLEEP DUE TO NOIS E ON POD. I/M APPEARS TO NEED PSYCH ATTENTION BUT REFUSES. WE DISCUSSE D COURT, HOW HE USE TO ACT,TSP,PRIOR MENTAL HEALTH ISSUES.AND DIAGNOSI S,HOW HE CAN NOT CONCENTRATE TO WRITE OR DRAW. HE WANTS TO MOVE TO U/1 . RAPID RAMBLING SPEECH, FACIAL AFFECT NOT APPRO.,THINKS OTHERS TALK ABOUT HIM AND HEARING VOICES IN THE PAST. MAY NEED INTERVENTION SOON.

STAFF NAME: BRANDON, HOWARD
TITLE: INMATE RELATIONS COORDINATOR
SITE: RIVERBEND MAXIMUM SECURITY INSTITUTION
NOTE DATE: 04/03/1995 TIME: 12:45:00
NOTE: SPOKE W/OFFENDER AT JAIL/INSTITUTION- SEE COMMENTS

COMMENT:
INMATE STATED THAT THERE WAS NO PROBLEMS.

STAFF NAME: BRANDON, HOWARD
TITLE: INMATE RELATIONS COORDINATOR

STAFF NAME: DONALDSON, CHERYL
TITLE: CORRECTIONAL COUNSELOR
SITE: RIVERBEND MAXIMUM SECURITY INSTITUTION
NOTE DATE: 04/12/1995 TIME: 13:00:00
NOTE: SPOKE W/OFFENDER AT JAIL/INSTITUTION- SEE COMMENTS

0000797

COMMENT:
I/M LYING IN BED WATCHING TV. NO GROUPS BUT WOULD LIKE TO ATTEND THE SUNRISE SERVICE. ASKED ME TO CALL DENTAL DUE TO HIS TOOTH ACHE. I ADVI SED SGT. PHILLIPS TO CALL.

BI01MAC TOMIS DATE: 05/14/1998
RMSI CONTACT HISTORY TIME: 10:04
DONACH01 FROM: 09/05/1992 TO: 05/14/1998 PAGE: 24

OMIS ID: 00108406 THOMPSON, GREGORY
STATUS: ACTIVE SEX: M DATE OF BIRTH: 12/13/1961
RACE: BLACK

STAFF NAME: DONALDSON, CHERYL
TITLE: CORRECTIONAL COUNSELOR
SITE: RIVERBEND MAXIMUM SECURITY INSTITUTION
NOTE DATE: 04/12/1995 TIME: 10:00:00
NOTE: SPOKE W/OFFENDER AT JAIL/INSTITUTION- SEE COMMENTS

COMMENT:
AND LAST WK. HE VERBALLY CURSED OUT FEMALE OFFICER AND CONTINUED TO PUSH EMERG.CALL BUTTON. HIS PAST RECORD SHOWS HE CAN BE POTENTIALLY DANGEROUS-SECURITY RISK. SELF MUTILATOR W/SCARS. ON 4/6/95-HIS SPEECH WAS RAPID AND RAMBLING AND HE JUMPED FROM ONE SUBJECT TO THE NEXT,EYES ARE RED DUE TO LACK OF SLEEP AND HE WEARS DARK SUNGLASSES,ADMITS TO HE ARING AND REACTING TO VOICES IN THE PAST AND REFUSES MEDS. AND SEES NO NEED TO SEE PSYCH SERVICES. HIS FACIAL AFFECT APPEARS FLAT AND MOOD SWINGS ARE PRESENT. CAUTION NEEDS TO BE USED.

STAFF NAME: DONALDSON, CHERYL
TITLE: CORRECTIONAL COUNSELOR
SITE: RIVERBEND MAXIMUM SECURITY INSTITUTION
NOTE DATE: 04/12/1995 TIME: 09:56:00
NOTE: SPOKE W/OFFENDER AT JAIL/INSTITUTION- SEE COMMENTS

COMMENT:
PLAN TO SUBMIT CR-3431 TO MENTAL HEALTH PSYCH SERVICES TO HAVE I/M EVALUATED DUE TO HIS COMPLAINTS OF LACK OF SLEEP BECAUSE OF NOISE AND OTHERS DELIBERATELY DOING THINGS TO AGGRAVATE HIM. HE CAN NOT CONCENTR ATE AND ADMITTED TO HEARING VOICES AND REACTING TO THEM IN THE PAST.HE

ATTACHMENT

"K"

0000107

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

RMSI

NAME: Gregory Thompson NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
1/30/95	8pm		Psychiatry - Rm 8A (seen in Dayroom) 53 yo BM c Dx of BAD presently Tx'd c risperdal d. presents stating that he be sent to specialist needs it he gets "back again, speech more pressured, rambling, reports (a hallucinations) hard to hearing, time difficulty, denies SI/HI irritability, last A level - a week ago, states he is getting more hostile because he isn't getting any sleep, feels he still can control himself, "I'm trying to calm down", appears to have some mild paranoia, circumstantial, pressure evidence of anger & depression. AP: BAD - denies medication & hasn't strongly recommend he restart his Mellaril which controlled his agitation & psychosis, d. states he will restart mellaril when he feels he needs it & will call psychiatrist. JD Scott MD	

Do Not Write on Back

584 (Rev 8/90) RDA-1458

ATTACHMENT

"L"

TENNESSEE DEPARTMENT OF CORRECTI 0000109

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Gregory Thompson NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
[illegible]	4[illegible]	S.	officer C/O Pt. behavior
W-2		O.	While this nurse delivering med to W-2
B208			officer Bert brought to this nurse attention
RMIS			that MR Thompson for past 2 weeks has
			constantly been on call light. Officer
			Bert & Cpl Grainger state that Pt.
			complains that his cell is "contaminated"
			and his radio is full of contamination
			and he wants his mattress and Cell Bed
			out of room. Officers state that Pt.
			acts up between the hours of 4pm
			-5pm every morning. Officer Bert states
			that Mr Thompson is the "only man"
			and is convinced he "may go off"
		A.	Same above. Poss Psychosis
		P.	Return to Unit for review. Pt. chart
			and Pt. will be ordered. Tx of symptoms
		I	Review chart and assist plan of action
		E	Incomplete
12/25/95	9[illegible]	S	Pt. states "he isn't crazy and never has been — his problem is caused by the radio waves and radiation from his cell's electrical
12/26/95	[illegible]		
	5:[illegible]pm	O	Pt. was getting out of shower & "decontaminating" himself. All of pt's clothing, mattress all possessions piled in front of his door to be "decontaminated" Pt. reports he can see static electricity all around his cell and that he is being charged by static electricity which is making him stronger even though he is losing wt. Last Psych eval since this writer last saw him in January

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B-1884 (Rev 8/90) RMA-1458

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
12/7/95 12/8/95	4:30 to 5:15	Cont)	Pt. compared his charges of electricity to that of the electric chair - "If I put you in the electric chair you would feel the electricity go through you - that's what I mean about my body." Maintained eye contact during conversation
		A	Manic behavior.
		P	Contact psych. for orders
		I	Discussed w pt that maybe he would feel better in another cell - pt refused. Also refused Mellaril again.
		E	Pt agreed to wait Dr. Jay this writer to talk to MD & see if he could be affected by electricity from radio. — Jenny Wells DRN
12/7/95	6:30		Discussed above w Dr. Pruett & order received to admit pt to Infirmary observation, command he will see pt. Video camera security is available to move pt safely in case of his agg. act - he of being combative — Jenny Wells DRN
	6:10		Pt to Infirmary without difficulty - questioning - use of chair & security of above orders — Jenny Wells DRN
	8:00		Pt provided to Infirmary & placed in observation cell. Pt has pants tied up w shoe string. All verbal responses appropriate @ present. Positive eye contact. Constant movement. Requesting hygiene items & tobacco products. Advised to wait until MD arrive and could discuss these items w MD. Pt verbalized understanding and calmly walked away from writer — Brenda Hearn
observation cell			

Do Not Write on Back

884 (Rev 8/90) RDA-1458

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
12/7/95	9p		Walking around cell. Good eye contact. Hyperverbal. Jumping from topic to topic. Affect very flat. All verbal responses appropriate. Waiting for Dr. Pruett to come in to see. — Brenda Hearn
	10p		Pacing more. Took cup of water from officer. Very blunt affect. Will continue to monitor. — Brenda Hearn
	11p		No D in assessment @ present — Brenda Hearn
	12n		Rapidly pacing in cell. Waiting for Dr. Pruett to come in. Will continue to monitor — Brenda Hearn
	12p		Talking to staff in cell. Pacing rapidly. Flat affect. Movements very rapid. Becoming agitated. Refused coffee from officers at this time. Will continue to monitor. Dr. Pruett advised of this via order in the chart — Brenda Hearn
12/7/95	4p		Writer was given an update from officers that Dr. Pruett advised he is on his way to the chart — Brenda Hearn

Do Not Write on Back

R-1884 (Rev 8/90) RDA-1458

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

NAME: Thompson, Gregory NUMBER 108406

S=SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
7/29/96	2115		Psychiatry - RMSP (seen in infirmary) 30 yo B/M of 2 Dx of BPAD previously taking Mellaril 100mg QHS who stopped his Mellaril 7d/pt ago to see if it would slow him down on the unit. Pt. was noted to become progressively more hypomanic since d/c'd last hosp. Continues to refuse meds until 7/27 when he agreed to take only Valium 10mg @ night. This was given for 2 days. Pt. was described this AM as becoming increasingly agitated, this AM stating that he knew what his problem was; it was that for the last 5 years he had been listening to the radio for 24 hrs/day & each was instructed. Pt. was taken to the infirmary and remained calm until ~ noon, & became progressively more agitated & paranoid feeling the lights were radiating him. On exam pt. was markedly agitated pacing, hyperverbal & pressured speech & demanding to talk to the MD alone in an office, locking & shutting the door which this was not done. Asst: BPAD, manic - pt. to be transferred to special needs, Dr. Mayer agrees to accept, will medicate pt. on transfer 2 Haldol 5mg/Benadryl 50mg/Ativan 2mg IM, to be psychotic & agitation. Emergency medication form signed per pt refusing meds & is lacking capacity to make this decision as well as presenting a danger to himself & others. Referred, md

Do Not Write on Back

-1684 (Rev 11/90) RDA-1458

189

ATTACHMENT

"M"

190

TENNESSEE DEPARTMENT OF CORRECTION

MENTAL HEALTH TREATMENT PLAN

Inmate: THOMPSON, GREGORY (Last, First, Middle) Number: 108406 DOB: 12/13/61 Sex: Male (DEATH ROW)

Referral Date: 5/27/95 Facility: SAND Treatment Status: INVOL Custody Status: MAX

Assigned Treatment Program: Acute Treatment Plan Formulation Date: 6/7/95.

Initial Treatment Plan: NO. or, Updated Treatment Plan: YES.

Presenting Problem: MR. THOMPSON WAS REFERRED FROM RMSI FOR HIS 1ST SAND ADMISSION. The Certificate of Mental Health Emergency Form Completed by Dr. Pruitt, RMSI Psychiatrist, Indicated Pt. Agitated, Pacing, Yelling, Expansive Paranoid Delusional Thought Content, Pressured Speech And Flight of Ideas. A mental Health Emergency was confirmed. Form dated 5/20/95 per Dr. Pruitt indicates Pt. Having Last Significant Amount of Sleep at 48 hrs as well as Presenting As Agitated And Threatening. The Form Indicates An Emergency Medication x1 IM Haldol 5 mg. DIAGNOSIS ATIVAN I.M., And Benadryl I.M. ADMISION Approved per Dr. Mayer.

Axis I: PSYCHOTIC DISORDER, N.O.S.
R/O

Axis II: Deferred.
R/O

Axis III: NO DIAGNOSIS.
R/O

Axis IV: INCARCERATION, DEATH ROW STATUS.

Axis V: CURRENT GAF: 30.
(see from Below) 61 Pt. explained that he had been given a GAF score of 30 and a "full" explanation of what that meant. He stated that he understood and had no questions. Pt. appears to be competent to refuse treatment.

Rationale for Treatment Continuation: UPON ADMISSION TO THE SAND MAX UNIT MR. THOMPSON WAS placed on MHSQ:15 MIN. MONITOR per Dr. MAYER. Per Dr. Mayer Pt. Rx the Psychotropic medication (Mellaril 200mg) that he was prescribed at RMSI. Mr. Thompson was seen By the TX TEAM on 5/30/95 At which time he denied Psychotic Symptoms. Pt. Was Non-Compliant With Medication. Since Admission Pt. Has "Threatened" staff. Pt. Has been observed Not Sleeping well and has Excess Energy. Pt. Displayed Difficulty Maintaining Focus of Attention. He denied Suicidal Ideation or Hx of Suicidal Attempts. Pt. Stated he had an attempt 10 yrs ago for a Court ordered Evaluation. Pt. Was Competent & Was Educated. He Saw His Options Were Limited. He Stated "I Need to get my mind back." Thought Restricted Unlimited Verbalizations. Pt. Was Observed Pacing Most of the Interview. He Stated "I Don't Want to be in a Trance." Dr. Mayer And Pt. Have A Good Relationship. He Stated He Wanted To Be "Drugged Up". He Stated "I Need to get my mind back." Thought Restricted Unlimited Verbalizations. Pt. Was Observed Pacing Most of the Interview. He Stated He Was Not Going To Take His Medication. Pt. Stated He Was Not Going To Take His Medication. Pt. Stated He Was Not Going To Take His Medication. Pt.

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED

530 S. Gay Street, Suite 900
Knoxville, Tennessee 37902

Elizabeth B. Ford
Federal Community Defender

Telephone 865-637-7979
Fax 865-637-7999

July 19, 2001

Heather Hines, Clerk
Circuit Court for Coffee County
P. O. Box 629
Manchester, TN 37349

Re: Gregory Thompson v. Ricky Bell, Warden, No. 31,213

Dear Ms. Hines:

Please find the original and two copies of the Reply to Response to Petition for Writ of *Error Coram Nobis* which I have prepared in the above matter and which I forward to you for filing. Please return a filed stamped copy in the enclosed self-addressed and prepaid envelope.

Thank you for your attention to this request. Should you have any questions, please feel free to call.

Yours very truly,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

Dana C. Hansen

Dana C. Hansen
Assistant Federal Community Defender
email: Dana_Hansen@fd.org

DCH:sas
enclosures
cc: Chris Vernon, Esq.
C. Michael Layne, Esq.

APPENDIX

"D"

IN THE FOURTEENTH JUDICIAL DISTRICT FOR THE STATE OF TENNESSEE

COFFEE COUNTY CIRCUIT COURT SITTING AT MANCHESTER

FILED

SEP 05 2001

CIRCUIT COURT
COFFEE COUNTY, TN
HEATHER MARIE DUNCAN, CLERK
TIME _____ AM/PM

GREGORY THOMPSON,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

NO. 31,213

OPINION AND ORDER

This matter is before the Court upon the petitioner, Gregory Thompson's, request for an evidentiary hearing in support of his Petition for Writ of Error Coram Nobis. The State has alleged in its response that the petitioner is not entitled to an evidentiary hearing because his claim is barred by the statute of limitations. Based upon the petition, the State's response, and the petitioner's reply, the Court upon a summary review makes the following findings:

PROCEDURAL BACKGROUND

Gregory Thompson is presently incarcerated at the Riverbend Maximum Security Institution in Nashville, Tennessee. He has previously been tried in the Criminal Circuit Court for Coffee County, Tennessee, and was convicted of murder in the first degree on August 22, 1985. He received a sentence of death. Mr. Thompson has been in the

custody of the Tennessee Department of Corrections since his conviction. His conviction and sentence was affirmed by the Tennessee Supreme Court on February 27, 1989. A Petition for Writ of Certiorari to the United States Supreme Court was denied on June 28, 1990. Petitioner filed a Petition for Post-Conviction Relief on October 16, 1990. Among the many allegations in the Petition were that his trial counsel failed to adequately investigate the petitioner"s personal and medical history and failed to obtain and request adequate expert assistance regarding his mental competency. In addition, the petitioner's post-conviction counsel argued that Gregory Thompson was not mentally competent to be executed. Petitioner's Post-Conviction Petition was heard before the Honorable Judge William Russell in March, 1995. An Opinion and Order denying petitioner's Post-Conviction Relief was entered on May 15, 1995. The Tennessee Court of Appeals affirmed the Trial Court. On October 28, 1997, the Tennessee Supreme Court denied the appellant's application for permission to appeal. A federal habeas corpus petition was filed, denied, and is currently pending in the federal appellate system.

FINDINGS OF LAW

The petitioner argues in his Petition for Writ of Error Coram Nobis that he suffers from a long-standing mental illness which was present at the time of the crime and trial. Petitioner argues that he is entitled to the Writ and a new trial because of "newly discovered evidence" and asks for an evidentiary hearing on the same. Petitioner's argument is based upon the recent holding in *Workman vs. State, 41 S.W.3d 100 (Tenn. 2001)*. In *Workman* contrary to the State's statute of limitations argument, the Tennessee Supreme Court held that due process concerns required that Workman be afforded an evidentiary hearing on his newly discovered evidence claims. In this case the State again argues that the petitioner is not entitled to an evidentiary hearing because his claim is barred by the

statute of limitations. The State argues that petitioner's supporting affidavit of Dr. Arney is not "newly discovered evidence". In this case the alleged "newly discovered evidence" concerns an affidavit in support of a petition for the appointment of a conservator for Mr. Thompson. Specifically, on January 19, 2001, Dr. Casey C. Arney, Mr. Thompson's state provided mental health professional, submitted a sworn affidavit recommending the appointment of a conservator for Mr. Thompson. Dr. Arney stated,

> Mr. Thompson is a 38 year old gentleman with a long history of Bipolar Disorder and psychotic symptoms. He has severe symptoms of mania with racing tangential thoughts, pressured speech, in delusional grandiosity. He becomes severely agitated and hostile at times. He has assaulted staff in the recent past which appears to be related to his mental illness. It has been recommended by the treatment review committee to be treated with involuntarily medication [sic] and have a conservator assigned to him.

Petitioner argues that this statement is an "admission against interest" by the State. Petitioner has attached several mental health expert affidavits in support of his Petition, all of which had been obtained for use either at his murder trial or at his previous post-conviction trial proceedings.

The Writ of Coram Nobis is an extraordinary remedy for those who can show that newly discovered evidence relating to matters litigated at the trial may have resulted in a different judgment had it been presented at the trial, see T.C.A. 40-26-105. Due process requires that litigants be able to present their claims at a meaningful time and in a meaningful manner. *Workman, at 102.* Due process can require the tolling of the applicable statute of limitations after carefully weighing the government and private interests affected by the official action.

From a review of the file, the petitioner's mental health issue was litigated at trial and has been reviewed and re-litigated during petitioner's appeals and the post-conviction process. There has been more than one finding that the petitioner was mentally

competent. After carefully weighing the competing interests of both sides in this case and a review of Dr. Arney's affidavit and the other supporting affidavits, the defendant points to no new evidence that may have made a difference at his criminal trial. The affidavit that the petitioner alleges as newly discovered evidence is merely an affidavit supporting a petition for conservatorship filed sixteen years after his criminal trial. Unlike *Workman*, the alleged evidence claimed by the petitioner does not go to his factual innocence of the murder but to a mental health issue that has been previously explored during prior court proceedings.

CONCLUSION

Accordingly, for the aforementioned reasons, this Court finds that Mr. Thompson's Petition for Writ of Error Coram Nobis is barred by the statute of limitations. Therefore, his petition is denied without an evidentiary hearing.

ENTER: This the 5 day of September, 2001.

L. CRAIG JOHNSON
CIRCUIT COURT JUDGE, PART I

I, the undersigned Circuit Court Clerk, do hereby certify that this is a true and correct copy of the original of this instrument.
Filed this 5 day of September, 2001
Circuit Court Clerk
Circuit Court/Collier County

APPENDIX

"E"

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 16, 2002 Session

GREGORY THOMPSON v. RICKY BELL, WARDEN

Circuit Court for Coffee County
No. 31,213

No. M2001-02460-CCA-OT-CO

FILED
AUG 15 2002
Clerk of the Courts

JUDGMENT

Came the Appellant, Gregory Thompson, by and through counsel, and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Circuit Court of Coffee County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, and the case is remanded to the Circuit Court of Coffee County for execution of the judgment of that court and for collection of costs accrued below.

Because it appears to the Court that Appellant, Gregory Thompson, is indigent, costs of the appeal will be paid by the State of Tennessee.

PER CURIAM
Thomas T. Woodall, Judge
J. Curwood Witt, Judge
Alan E. Glenn, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 16, 2002 Session

GREGORY THOMPSON v. RICKY BELL, WARDEN

Direct Appeal from the Circuit Court for Coffee County
No. 31,213 L. Craig Johnson, Judge

No. M2001-02460-CCA-OT-CO

FILED
AUG 15 2002
Clerk of the Courts

Appellant, Gregory Thompson, was convicted for the first degree murder of Brenda Lane. The murder occurred on January 1, 1985. The jury imposed the death penalty. Our supreme court affirmed the conviction and sentence of death. State v. Thompson, 768 S.W.2d 239 (Tenn. 1989). Appellant subsequently filed a petition for post-conviction relief. The petition was denied by the trial court, and the trial court's denial was subsequently affirmed by our Court. Thompson v. State, 958 S.W.2d 156 (Tenn. Crim. App. 1997). Later, in 2001, Appellant filed a petition for writ of error coram nobis, which the trial court dismissed without an evidentiary hearing because it was filed after expiration of the applicable one-year statute of limitations. This appeal followed. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which J. CURWOOD WITT and ALAN E. GLENN, JJ., joined.

Marjorie A. Bristol, Nashville, Tennessee, for the appellant, Gregory Thompson.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Smith, Assistant Attorney General; C. Michael Layne, District Attorney General; and Chris Vernon, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In his petition for writ of error coram nobis, Appellant asserts that "new evidence" of his mental incapacity exists which would have resulted in a different judgment if the jury had been aware of the evidence at the time of his trial. Defendant bases this theory on a petition filed in the Chancery Court of Davidson County, with the State of Tennessee Department of Correction as petitioner, seeking to have a conservator appointed for Appellant. The Department of Correction asserted that the appointment of a conservator was for the limited purpose of providing consent for

Appellant to "receive medical and psychiatric treatment, including the forcible administration of medications if the conservator finds that such is necessary."

The conservatorship petition, filed by the State Attorney General representing the Department of Correction, alleged in pertinent part that Appellant was in need of protection and assistance by reason of an illness which rendered him "presently disabled." The conservatorship petition further alleged that Dr. Casey Arney, Appellant's treating psychiatrist, had diagnosed Appellant as suffering from "a long history of Bipolar Disorder and psychotic symptoms." No further quantification of the time period of Appellant's mental disability was made in the conservatorship petition.

The conservatorship petition was filed March 14, 2001, almost sixteen years after Appellant was convicted of first degree murder and sentenced to death. Dr. Arney's letter in support of the appointment of a conservator, which was sworn to in the presence of a notary public, is dated January 19, 2001.

During Appellant's trial and post-conviction proceedings, the State contested all assertions by Appellant that his mental condition was a valid defense to the crime for which he was charged, and/or that his mental condition was a mitigating factor as to the sentencing. See State v. Thompson, 768 S.W.2d 239, 248-49 (Tenn. 1989); Thompson v. State, 958 S.W.2d 156, 164-65 (Tenn. Crim. App. 1997). In the opinion of this Court in the post-conviction case, our Court noted that Appellant was diagnosed with "bipolar disorder, schizo affective disorder or schizophrenia" *since his incarceration* for the murder of Brenda Lane. Thompson, 958 S.W.2d at 164. Although Appellant, in his petition and in his brief on appeal, renews allegations of ineffective assistance of counsel at trial, the crux of his argument in the present coram nobis petition is based on a claim that the State has since reversed its position and now agrees that Appellant has a debilitating mental illness.

The purported "new evidence" in this case, which consists of Dr. Arney's sworn letter supporting the appointment of a conservator, does not support Appellant's assertion that he was suffering from any mental disability at the time of the criminal offense for which he was convicted or at the time of his trial. Likewise, the Department of Correction's petition for appointment of a conservator does not, in and of itself, constitute "evidence," new or old. Hillhaven Corp. v. State ex rel. Manor Care, Inc., 565 S.W.2d 210, 212 (Tenn.1978) (allegations in pleadings do not constitute evidence of the facts averred); State v. Dykes, 803 S.W.2d 150, 255 (Tenn. Crim. App. 1990). Neither does the conservatorship petition constitute a concession by the State Attorney General that Appellant was mentally disabled at the time of the criminal offense or at the time of Appellant's trial.

The relief by petition for writ of error coram nobis is provided for in Tennessee Code Annotated section 40-26-105. As previously noted by our Court, "[t]he purpose of this remedy 'is to bring to the attention of the [trial] court some fact unknown to the court, which if known would have resulted in a different judgment.'" State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting State ex rel. Carlson v. State, 407 S.W.2d 165, 167 (Tenn. 1996)).

Tennessee Code Annotated section 27-7-103 provides a statute of limitations of one year after the judgment becomes final for filing a petition for writ of error coram nobis. In State v. Mixon, 983 S.W.2d 661 (Tenn. 1999), our supreme court clarified that the petition must be filed within one year of the date that the judgment became final in the *trial* court. Id. at 670. A judgment is final in the trial court thirty days after entry of the judgment if no post-trial motions are filed, and, if a post-trial motion is filed, the judgment is final upon entry of an order disposing of the post-trial motion. Id.

There is no question that Appellant's petition for writ of error coram nobis was filed outside of the applicable statute of limitations. It was filed more than fifteen years after the judgment became final in the trial court. However, in Workman v. State, 41 S.W.3d 100 (Tenn. 2001), our supreme court held that the constitutional rights of due process may require tolling of the statute of limitations in a proceeding where a petition for writ of error coram nobis has been filed. Id. at 103. Workman involved a capital case wherein the petitioner argued that certain late-discovered evidence, i.e., a previously unavailable x-ray and the recanted testimony of a crucial witness, would show that he was actually innocent of the crime for which he was convicted. In State v. Ratliff, 71 S.W.3d 291 (Tenn. Crim. App. 2001), our Court applied the holding in Workman to a conviction in a non-capital case. The defendant in Ratliff was convicted of rape of a child and sentenced to serve twenty-four years in the Department of Correction. The judgment became final on December 7, 1998. He filed a petition for writ of error coram nobis on December 21, 1999, fourteen days outside of the applicable statute of limitations. The "new evidence" was alleged to be a total recantation of the testimony by the victim. Our court noted that the great weight of evidence against the defendant came from the testimony of the victim at trial. In November 1999, within the statute of limitations, the victim and her mother had contacted the prosecutor's office to discuss the fact that the victim had given false testimony at defendant's trial. Our Court held that, under the circumstances presented in Ratliff, due process precluded a summary dismissal of the petition for writ of error coram nobis based upon the expiration of the statute of limitations. Id. at 298.

The case sub judice is distinguishable from both Workman and Ratliff. First of all, the "newly discovered evidence" asserted by Appellant in this case does not purport to show his "actual innocence" of the crime for which he was convicted. Nor does it constitute mitigating evidence regarding his sentence. As noted above, assertions by a party in a pleading are not "evidence." Furthermore, Dr. Arney's letter, written more than fifteen years after the commission of the criminal offense, does not even assert that Appellant had any mental illness at the time of the commission of the offense. Finally, as reflected in this court's opinion in Appellant's post-conviction proceeding, there was evidence, at least as early at 1995, that Appellant's mental illness developed subsequent to his incarceration.

The crux of Appellant's petition is that he should be granted a hearing because the State of Tennessee, throughout the trial proceedings and direct appeals thereof, and throughout the post-conviction proceedings, successfully argued that Appellant did not have a mental illness which would constitute a defense to the crime or a mitigating factor for sentencing. Appellant argues that the State now concedes that Appellant has a mental illness. The only conclusion that can be

logically drawn from the conservatorship petition, however, is that the State Attorney General, representing the Department of Correction, asserts that Appellant was in need of a conservator for the limited purpose of giving consent to medical and psychiatric treatment in March 2001. This does not constitute "newly discovered evidence" within the parameters for relief provided by the writ of error coram nobis; neither does due process require a tolling of the applicable statute of limitations. The judgment of the trial court is therefore affirmed.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the trial court.

Thomas T. Woodall
THOMAS T. WOODALL, JUDGE

APPENDIX

"F"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GREGORY THOMPSON v. RICKY BELL, WARDEN

Circuit Court for Coffee County
No. 31,213

No. M2001-02460-SC-R11-CO

FILED
DEC 23 2002
Clerk of the Courts
Rec'd By

ORDER

Upon consideration of the application for permission to appeal of Gregory Thompson and the record before us, the application is denied.

PER CURIAM

APPENDIX

"G"

Case No: 00-5516
UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED

JUN 22 2001

LEONARD GREEN, Clerk

GREGORY THOMPSON

Petitioner - Appellant

v.

RICKY BELL, Warden

Respondent - Appellee

Upon consideration of the appellant's motion to hold the proceedings in abeyance pending resolution of a related state court case,

And further considering the response in opposition thereto,

It is ORDERED that the motion be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

APPENDIX

"H"

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 2:00-5516
	)	
RICKY BELL, Warden	)	
	)	
Respondent-Appellee	)	

NOTICE OF FILING

COMES NOW, Petitioner-Appellant Gregory Thompson, through undersigned counsel and gives notice that of the State of Tennessee's most recent position regarding Mr. Thompson's mental state. On June 26, 2001, the State of Tennessee denied a request for medical records made by Mr. Thompson's counsel. The basis for the denial of records is the release form which accompanied the request. The State of Tennessee's position is that the release form signed by Mr. Thompson is invalid in light of the appointment of a conservator. *See* Attachment A, letter from Kelly Baker. The State's contention that Mr. Thompson's mental state is so depreciated as to render a signed release form for medical records invalid supports the mental heath claims Mr. Thompson has raised before the

Court.

WHEREFORE, Mr. Thompson respectfully requests the Court to take notice of the State's most recent comment on Mr. Thompson's mental state.

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By Dana C. Hansen
Dana C. Hansen
Assistant Federal Community Defender
530 S. Gay St., Suite 900
Knoxville, TN 37902
(865) 637-7979
B.P.R. #19098

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing document was mailed to:

Glen R. Pruden, Esquire
Office of Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Jennifer L. Smith, Esquire
Office of Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

this the 2 day of July, 2001, by postage prepaid delivery.

Dana C. Hansen
Dana C. Hansen

{3}

ATTACHMENT

"A"

RECEIVED

'01 JUN 29 AM 10 15

OF EASTERN TENNESSEE

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
6TH FLOOR RACHEL JACKSON BLDG.
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

June 26, 2001

Michael R. Chavis
Investigator
Federal Defender Services
of Eastern Tennessee, Inc.
530 South Gay Street, Suite 900
Knoxville, Tennessee 37902

RE: Gregory Thompson, #108406
Public Records Request

Dear Mr. Chavis:

This letter is in response to your request for access to any and all files in my department's possession pertaining to Mr. Gregory Thompson.

On June 8, 2001, I spoke to Dana Hanson, an attorney in your office, and she clarified that your public records request addressed to my attention dated June 1, 2001, was directed specifically at any and all files in the Tennessee Department of Correction, Legal Division's possession pertaining to Mr. Thompson.

I have determined that three separate files exist in the Tennessee Department of Correction Legal Division pertaining to Mr. Thompson. The files are as follows:

1. Correspondence file regarding Gregory Thompson maintained by Debra Inglis, General Counsel
2. Deathrow Tracking file maintained by Bill Hutcherson, Staff Counsel
3. Conservatorship file maintained by Kelley Baker, Staff Counsel

You requested that our office set forth any itemized list of withheld materials along with our authority to withhold such materials. Following please find a list of all materials withheld:

1. Correspondence File - Medical information prepared in response to complaint allegations constitutes attorney work product.
2. Correspondence File - Memorandum from Mark A. Hudson, Senior Counsel, Office of the Attorney General, to Debra K. Inglis, Chief General Counsel, Tennessee Department of Correction dated April 5, 1999, constitutes attorney work product.
3. Correspondence File - Medical information pertaining to two other inmates redacted pursuant to T.C.A. § 10-7-504(a)(1).
4. Conservatorship File - Physician's evaluation prepared by Dr. Casey Arney dated January 19, 2001 - filed with Davidson County Chancery Court Part II under seal, Docket No. 01-1041-II.
5. Conservatorship File - Tennessee Department of Correction Mental Health Treatment Review Committee Report dated January 8, 2001 - filed with Davidson County Chancery Court Part II under seal, Docket No. 01-1041-II.
6. Conservatorship File - Tennessee Department of Correction Mental Health Treatment Review Committee Report dated November 20, 2001 - confidential medical record pursuant to T.C.A. 10-7-504(a)(1).

Furthermore, please note that pursuant to the court order appointing Sherry Goodwin as conservator for Mr. Thompson, we cannot accept an authorization signed by Mr. Thompson for release of his mental or medical healthcare information. Any such release must be signed by Ms. Goodwin.

The cost of copying the files which are available for your inspection pursuant to the Tennessee Public Records Act is twenty cents per page for a total of $38.20 an invoice is enclosed. Such files will be copied upon receipt of payment. Additionally, please provide a mailing address for delivery of such records.

Sincerely,

Kelley Blevins Baker
Staff Counsel

Enclosure: Invoice

APPENDIX

"I"

Case No: 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
MAR 2 4 2003
LEONARD GREEN, Clerk

GREGORY THOMPSON
Petitioner - Appellant

v.

RICKY BELL, Warden
Respondent - Appellee

BEFORE: SUHRHEINRICH, MOORE and CLAY, Circuit Judges

Upon consideration of appellant's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX

"J"

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: GREGORY THOMPSON) COFFEE COUNTY
) ORIGINAL APPEAL NO.
) M1987-00027-SC-MWR-DD

MOTION TO SET EXECUTION DATE

Pursuant to Rule 12.4(A), Rules of the Supreme Court of Tennessee, the State of Tennessee respectfully requests that the Court set an execution date for Gregory Thompson. In support of this motion, the State relies on the following:

1. Thompson was convicted in 1985 by a Coffee County jury of first degree murder and sentenced to death. This Court affirmed the judgment, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and the United States Supreme Court denied a petition for a writ of certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990).

2. In 1990, Thompson sought post-conviction relief in the trial court, which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997).

3. In 1998, Thompson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. The district court granted summary judgment in favor of the warden and dismissed the petition. The

United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003)(reh. denied Mar. 12, 2003). The United States Supreme Court denied a petition for writ of certiorari on December 1, 2003. *Thompson v. Bell*, 540 U.S. __, 124 S.Ct. 804 (2003) (No. 03-5759), and denied a petition for rehearing on January 20, 2004. *Thompson v. Bell*, __ S.Ct. __, 2004 WL 76656 (2004).

4. Thompson has completed the standard three-tier appeals process, making the setting of an execution date appropriate. *See* Rule 12.4(A). The State therefore requests that an execution date be set no later than thirty (30) from entry of the Court's order pursuant to Rule 12.4(E) ("The Court shall set the date of execution no less then thirty (30) days from the date of the order granting the State's motion.").

For the reasons stated, a new execution date should be set.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Senior Counsel
Attorney of Record
P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-3487
Fax: (615) 532-7791
Email: jennifer.lynn.smith@state.tn.us
B.P.R. No. 16514

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid on this the 21st day of January 2004 to:

Dana C. Hansen Chavis
Federal Defender Services
of Eastern Tennessee, Inc.
530 South Gay Street, Suite 900
Knoxville, TN 37902
Phone: (865) 637-7979
FAX: (865) 637-7999

The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by Facsimile at (615) 532-1971.

Jennifer L Smith

JENNIFER L. SMITH
Senior Counsel

cc: C. Michael Layne
District Attorney General
14th Judicial District
307 S. Woodland St.
P.O. Box 147
Manchester, TN 37439-0147

APPENDIX

"K"

No. 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
RICKY BELL, Warden,	)
	)
Respondent-Appellee.	)

MOTION TO RECONSIDER APPOINTMENT ORDER

Respondent-Appellee, Ricky Bell, requests that this Court reconsider its order filed July 26, 2002, granting petitioner's *ex parte* motion for authorization to expand the appointment of counsel to include state court proceedings. In support of this motion, respondent states as follows:

1. On July 26, 2002, this Court entered an order granting a motion by petitioner's counsel, Federal Defender Services of Eastern Tennessee, Inc., to expand its appointment to include state court proceedings. (Copy attached as Appendix A) Because petitioner's counsel filed the motion *ex parte*, without proper service upon respondent as required under Fed. R. App. P. 25(b) ("Unless a

rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review"), respondent's counsel did not have an opportunity, prior to entry of the order, to file a response in opposition to petitioner's motion.

2. On June 16, 2003, this Court, sitting *en banc* in *Paul Gregory House v. Ricky Bell*, No. 00-6136, entered an order addressing the propriety of expanding the appointment of Federal Defender Services of Eastern Tennessee, Inc. to include representation of Paul Gregory House in state court proceedings.[1] In *House*, as in this case, Federal Defender Services sought to have its appointment expanded, and thus paid by the federal government, for state court representation.

3. After reviewing the pertinent authority regarding the scope of appointments under Section 848(q)(4)(B), including decisions of the Fifth, Eighth and Eleventh Circuit Courts of Appeal, this Court held, "[w]e agree with our sister circuits that Section 848(q)(4)(B) must be construed narrowly and agree with their conclusion that the *statute does not authorize federal compensation for representation in state proceedings*." (emphasis added) The Court thus concluded:

---

[1]Respondent notes that the motion in *House v. Bell*, No. 00-6136, was also filed *ex parte* without proper service upon respondent's counsel as required under Fed. R. App. P. 25.

> The rule is simple. The two representations shall not mix. The state shall be responsible for state proceedings, and the federal government shall be responsible for federal proceedings. As the weight of authority does not support House's request to have Federal Defender represent him in the state court proceedings at the expense of the federal government, House's motion to expand Federal Defender's representation beyond its federal court responsibilities is denied.

See Order, *House v. Bell*, No. 00-6136, at p. 4 (Copy attached as Appendix B).

4. Under this Court's decision in *House, supra*, expansion of Federal Defender Service's representation in this case to include state conservatorship proceedings is not authorized by federal statute, and the Court's July 26, 2003, order to the contrary should be reconsidered. Moreover, the state courts have already appointed both an attorney (Beth Boone, Esq. of Willis and Knight Law Firm in Nashville, Tennessee) and a conservator (Frank R. Freeman, Esq. of Nashville, Tennessee) at state expense to represent petitioner's interests in the conservatorship proceedings. Thus, expansion of the federal appointment to Tennessee state proceedings is not only improper under federal law, but unnecessary.

WHEREFORE, respondent requests, in light of the June 16, 2003, order of the *en banc* Court in *House v. Bell*, No. 00-6136, that the Court reconsider its previous order expanding the appointment of Federal Defender Services of Eastern Tennessee, Inc., to include state court conservatorship proceedings involving the

petitioner, Gregory Thompson.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter

JENNIFER L. SMITH
Senior Counsel
Criminal Justice Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3487
B.P.R. No. 16514

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first-class mail, postage prepaid to Dana C. Hansen, Assistant Federal Public Defender, 530 S. Gay Street, Suite 900, Knoxville, TN 37902, on the 19th day of August, 2003.

JENNIFER L. SMITH
Senior Counsel

No. 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,)
)
Petitioner-Appellant,)
)
v.)
)
RICKY BELL, Warden,)
)
Respondent-Appellee.)

APPENDIX A

Case No: 00-5516

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COPY

ORDER

FILED

JUL 2 6 2002

LEONARD GREEN, Clerk

GREGORY THOMPSON

Petitioner - Appellant

v.

RICKY BELL, Warden

Respondent - Appellee

Upon consideration of the ex parte motion filed by counsel for authorization to expand the appointment to include state court proceedings,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

No. 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
RICKY BELL, Warden,	)
	)
Respondent-Appellee.	)

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2003 FED App. 0196P (6th Cir.)
File Name: 03a0196p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL GREGORY HOUSE, *Petitioner-Appellant,* v. RICKY BELL, Warden, *Respondent-Appellee.*	No. 00-6136

Filed: June 16, 2003

Before: MARTIN, Chief Circuit Judge; MERRITT, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

ORDER

BOYCE F. MARTIN, JR., Chief Circuit Judge. Paul Gregory House, who has been sentenced to death, requests an order authorizing Federal Defender Services of Eastern Tennessee, Inc., to represent him in pending state court proceedings. Federal Defender was appointed to represent House in his federal habeas corpus proceeding in the United States District Court for the Eastern District of Tennessee pursuant to 21 U.S.C. § 848(q). This court has yet to issue a final *en banc* decision, as we are awaiting a ruling from the

Tennessee Supreme Court on three certified questions. A writ of certiorari is also pending before the Supreme Court of the United States. Nevertheless, House has initiated litigation in order to obtain relief in the state courts of Tennessee on claims of ineffective assistance of counsel, withholding exculpatory evidence, and misconduct by the police and the prosecutor. House seeks to have Federal Defender's appointment expanded and therefore paid by the federal government for the state court representation. After review the applicable case law from our sister circuits, we find that Section 848(q) does not authorize the expanded appointment. Accordingly the motion is denied.

As the facts surrounding House's conviction were fully discussed in our prior opinion, *House v. Bell*, 311 F.3d 767, 769-71 (6th Cir. 2002), we will not reiterate them here. The sole question before us concerns whether Section 848(q) will allow Federal Defender to be compensated for any state work. Section 848(q)(4)(B) authorizes the appointment of counsel for any indigent defendant in any post conviction proceedings under 28 U.S.C. § 2254 (seeking to vacate or set aside a state death sentence), as well as for federal death sentences under 28 U.S.C. § 2255. The statute also provides that a defendant is entitled to "the furnishings of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)." 21 U.S.C. § 848(q)(4)(B). Section 848(q)(8) provides that appointed attorneys:

> shall represent the defendant throughout every subsequent stage of available judicial proceedings, including the pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

PUBLISHER'S NOTE:

PAGE(S) 233-234 MISSING IN ORIGINAL DOCUMENT

APPENDIX

"L"

Case No: 00-5516

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED

JUL 26 2002

LEONARD GREEN, Clerk

GREGORY THOMPSON

Petitioner - Appellant

v.

RICKY BELL, Warden

Respondent - Appellee

Upon consideration of the ex parte motion filed by counsel for authorization to expand the appointment to include state court proceedings,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

APPENDIX

"M"

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 2:00-5516
	)	DEATH PENALTY CASE
RICKY BELL, Warden	)	
	)	
Respondent-Appellee	)	

RESPONSE TO RESPONDENT'S MOTION TO RECONSIDER APPOINTMENT ORDER

COMES NOW Petitioner-Appellant, Gregory Thompson, through undersigned counsel and submits the following response to Respondent's motion to reconsider appointment order.

BACKGROUND

This Court will remember that it issued an order expanding Federal Defender Services of Eastern Tennessee, Inc.'s (FDSET) representation of Mr. Thompson to include state court proceedings. State court litigation was initiated by FDSET in order to obtain public records and medical records of Mr. Thompson from the prison which the State would not provide and which could not be

otherwise obtained.[1] Suit was also filed to challenge the State's appointment of a conservator to Mr. Thompson for the purpose of forcibly medicating him.[2] These issues were spawned from and are directly related to his federal habeas corpus proceedings and any upcoming proceedings under *Ford v. Wainwright*.

INTRODUCTION

This Court's order of July 26, 2002, should not be disturbed and the instant motion should be denied because (1) the State lacks standing to interfere in the administration of undersigned counsel (2) the State's motion lacks legal authority because it was untimely filed and relies solely upon a non-final order of this Court (3) the State's motion lacks moral authority because it is designed to deny counsel to Mr. Thompson and is advanced in bad faith (4) FDSET's representation of Mr. Thompson in state court is proper because the state court proceeding is ancillary to federal court proceedings, and (5) with this Court's permission, which has already been granted, Federal Defender Services of Eastern Tennessee, Inc. is authorized to represent Mr. Thompson in the state court proceeding.

---

[1]These proceedings are concluded.

[2]This proceeding is pending.

I. THE STATE LACKS STANDING TO PREVENT COUNSEL FROM REPRESENTING MR. THOMPSON

The motion to reconsider should be denied because the State does not have standing to interfere with Mr. Thompson's representation. FDSET was originally appointed to represent Mr. Thompson by the District Court for the Eastern District of Tennessee pursuant to 21 U.S.C. § 848(q)(4)(B). As this Court is aware, FDSET is a non-profit organization which operates under a grant and conditions from the Judicial Conference via the Administrative Office of the United States Courts. FDSET is a community defender organization, as opposed to a federal public defender office, and its employees are not federal government employees.[3] FDSET operates under the umbrella of the Defender Services Division of the Administrative Office of the United States Courts. The appointment of FDSET is guided by the Criminal Justice Act and the Administrative Office and is approved by this Court and Federal District Courts for the Eastern District of Tennessee. The appointment and administration of counsel is a matter between the Administrative Office, the federal courts and appointed counsel.

The State of Tennessee has neither authority nor standing to interfere in the

[3]Because FDSET employees are not federal employees, the Code of Conduct for Federal Public Defender Employees regarding outside employment is inapplicable.

administration of counsel under the Criminal Justice Act.[4] It is inappropriate for the Attorney General's office to interfere in this matter. *West v. Atkins*, 487 U.S. 42, 50 (1988)(the state government is constitutionally required to respect the independence of criminal defense counsel); *Sullivan v. United States*, 21 F.3d 198, 202 (7th Cir. 1994)(the actions of the federal defender in her capacity as counsel for a client are beyond the control of the federal government). For these reasons, the State's most recent attempt to interfere with Mr. Thompson's representation should not be sanctioned. The motion to reconsider should be denied.

II. THE STATE'S MOTION LACKS LEGAL AUTHORITY TO PREVENT FDSET FROM REPRESENTING MR. THOMPSON IN STATE COURT PROCEEDINGS

The motion to reconsider should be denied because it is out of time and is based solely upon a non-final order of this Court. 6 Cir. R. 45(b) allows reconsideration of an order within ten (10) days of service of notice of the entry of such order. The instant motion to reconsider was filed 390 days after the order

[4]The Attorney General's Office for the State of Tennessee is not a ward of federal taxpayer money. The Attorney General's Office may have an interest in how state taxpayer money is allocated and apparently is advocating that counsel for Mr. Thompson in the current state court proceeding should be paid from state funds. However, in making this implicit suggestion, the Attorney General's Office fails to alert the Court that it has vigorously opposed not only FDSET's representation of Mr. Thompson but also state counsel's representation of Mr. Thompson. The state's relentless attempts to deprive Mr. Thompson of counsel in state proceedings are detailed *infra* at section III.

expanding FDSET's representation to include state court proceedings was entered and 54 days after the order in *House*, on which the State bases its motion, was filed. Clearly the State's untimely motion is not authorized under the rules of this Court.

Furthermore, the only authority cited by the State is the July 16, 2003, order of this Court in *House v. Bell*, No. 00-6136. The order in *House*, however, is not mandatory authority. First, the order in *House* is not yet final. The State is well aware that Mr. House has filed a motion to stay the effect of that order and has requested the Court to rehear the representation issue. This motion remains pending.

Second, the *House* case is distinguishable on its face and on its facts from Mr. Thompson's case. Importantly, unlike in *House*, this Court has already expanded FDSET's appointment to include representation of Mr. Thompson in state court. This Court has determined that FDSET's appearance in state court is reasonably necessary to provide Mr. Thompson with legal representation and to carry out the requirements of FDSET's representation of Mr. Thompson. Because the recent order in *House* does not dictate the results in Mr. Thompson's case, the motion to reconsider should be denied.

III. THE STATE'S MOTION LACKS MORAL AUTHORITY TO DEPRIVE MR. THOMPSON OF HIS ATTORNEYS

The motion to reconsider should be denied because it is designed to deny counsel to Mr. Thompson and is advanced in bad faith. This motion cannot be considered in a vacuum.[5] From the inception of the State's legal proceedings against Mr. Thompson in state court the State has fought to deprive him of an attorney. The instant motion is just another attempt to revive its failed efforts.

A. The State deprived Mr. Thompson of an attorney when it sought a conservatorship for the purpose of forcing medication upon him.

On April 3, 2001, the State filed a motion for appointment of a conservator for the purpose of forcibly medicating Mr. Thompson. Despite being aware that Mr. Thompson was represented by FDSET, the State failed to serve a copy of this motion on FDSET counsel or provide notice of the conservatorship hearing. The state court appointed a conservator to Mr. Thompson. Attachment A, order appointing conservator. The conservatorship order deprives Mr. Thompson of the right to make decisions regarding his medical treatment and medications and vests the conservator with the power to consent to forcible medication of Mr.

---

[5]For a recap of the state proceedings where the State repeatedly attempted to remove Mr. Thompson's counsel from the proceedings *see* Attachment B, Reply to Response toMotion to alter or amend 8/22/02.

Thompson.

B. **The State sought to prevent Mr. Thompson's FDSET attorney from litigating the proceeding seeking to terminate the conservatorship.**

After undersigned counsel learned of the order appointing a conservator and conducted an investigation, a motion to terminate the conservatorship was filed. The State sought to strike the pleadings filed by Mr. Thompson's counsel (FDSET) and disqualify FDSET counsel from participating in the state court proceedings. On July 2, 2002, the State filed a motion to preclude the appearance of undersigned counsel asserting that such appearance constitutes the "unauthorized practice of law". Attachment C, Motion to Preclude and Memorandum in Support of Motion to Preclude)

C. **The State sought to prevent state defense attorneys from representing Mr. Thompson at the proceeding seeking to terminate the conservatorship.**

In reaction to the entry of appearance by state counsel on behalf of Mr. Thompson in the conservatorship proceeding, the State tried to prevent state counsel from representing Mr. Thompson. Attachment D, transcript pp. 12-26 Hearing 1/25/02). When the Commission overseeing state counsel stepped in to meet this challenge, the State also fought the appearance of counsel on behalf of the commission. (Attachment D, transcript p. 25, Hearing 1/25/02). The State

argued Mr. Thompson was not entitled to an attorney – period. Attachment D, transcript Hearing 1/25/02, pp. 14-15, 26. The State later argued Mr. Thompson did not need his own attorney because there was a conservator and attorney *ad litem* involved in the case. Attachment E, transcript Hearing 8/28/02).

D. **The State sought to prevent Mr. Thompson's court-appointed attorney *ad litem* from receiving full compensation for her representation of Mr. Thompson during the proceedings to terminate the conservatorship.**

At the same time the State was asserting that Mr. Thompson was amply represented by both the conservator and attorney *ad litem*, the State also sought to deny compensation to the attorney *ad litem*. *See* Attachment F, transcript Hearing 6/28/02 pp. 4-13. When the state court granted the attorney *ad litem's* fee motion the State filed an appeal. (Attachment G, Notice of Appeal)

E. **The State's attempts to deny Mr. Thompson an attorney were rejected by the State probate court.**

The state court disagreed with the State's position and permitted state counsel to represent Mr. Thompson.[6] The state court specifically found that Mr. Thompson was entitled to the protection and assistance of his criminal defense lawyers in the conservatorship proceeding. Attachment D, transcript p. 87-91,

[6]The issue regarding FDSET's representation of Mr. Thompson was pretermitted by this Court order authorizing FDSET's representation. *See* Attachment H, state's motion to withdraw motion to preclude 8/6/02.

Hearing 1/25/02.

F. The State's attempts to deny Mr. Thompson an attorney were also rejected by the Tennessee Court of Criminal Appeals.

During this time, state counsel was unable to continue in the termination proceeding and appellate litigation of a separate, but related, state court proceeding. When undersigned counsel entered an appearance in that proceeding, the State filed another motion to preclude FDSET's appearance. Attachment I, motion to preclude 7/9/02. The Tennessee Court of Criminal Appeals denied the State's motion. Attachment J, *Thompson v. Bell*, No. M2001-02460-CCA-OT-CO (Tenn.Crim.App. Order 7/16/02).

G. This most recent attempt to deny Mr. Thompson of the protection and assistance of his lawyers should also be thwarted.

On July 26, 2002, this Court expanded the scope of FDSET's representation of Mr. Thompson to include state court proceedings. The only state court proceeding which remains pending is that seeking to terminate the conservatorship. Undersigned has continued to represent Mr. Thompson's interests in that proceeding and has advocated the termination of the conservatorship with its forced medication provision. Because the State has no legitimate interest in preventing Mr. Thompson from receiving protection and assistance from the lawyers who have represented him since 1998, and for all

other reasons set forth herein, the motion to reconsider should be denied.

IV. FDSET'S REPRESENTATION OF MR. THOMSON IS PROPER BECAUSE THE STATE COURT PROCEEDING DIRECTLY RELATES TO FEDERAL COURT PROCEEDINGS

The conservatorship providing for forced medication of Mr. Thompson was spawned from his federal habeas proceedings and is directly related to future federal proceedings, including proceedings under *Ford v. Wainwright*.

A. Mr. Thompson's habeas petition raised his mental state as grounds for relief.

The habeas claims of continued relevance are Claim 22, the ineffective assistance of counsel for failing to conduct a mental health investigation and present mitigating evidence of Mr. Thompson's compromised mental state at the time of the crime and Claim 37, Mr. Thompson is incompetent to be executed and Claim 41, the state misconduct claim. With respect to the *Ford* claim, the district court dismissed it without prejudice for reasons of ripeness because an execution date had not been scheduled. (Attachment K, Memorandum 2/17/00 p. 101-102). Therefore, at a minimum, the *Ford* issue will be raised and litigated in future proceedings.

B. Mr. Thompson's competence was an issue during district court proceedings.

On February 12, 1999, counsel filed a motion with the district court seeking

injunctive relief and an order finding Mr. Thompson incompetent to proceed and tolling of the proceedings. The motion asserted that mental health treatment had been withdrawn by personnel at the Department of Corrections and Mr. Thompson's mental state had severely decompensated, rendering him incompetent. (Attachment L, *Ex Parte* Motion 2/12/99). It was at a status hearing that Assistant Attorney General Smith first introduced the idea of appointing a conservator for forced medication purposes. (Attachment M, Transcript, p. 6, Hearing 3/8/98). The district court ordered the parties to submit points of law and scheduled a hearing. (Attachment M, p. 15-16). Mr. Thompson's memorandum of law vigorously opposed the appointment of a fiduciary to Mr. Thompson. (Attachment N, Memorandum 4/1/99). Subsequently, Mr. Thompson's motion was withdrawn because Mr. Thompson's treating mental health staff adjusted their treatment and again provided him with medication and Mr. Thompson's condition was showing improvement. (Attachment O, Withdrawal Motion 4/7/99).

C. Mr. Thompson's competence was an issue during proceedings in this Court.

On March 14, 2001, after the briefs were filed in this case, the State of Tennessee, through Attorney General and Reporter Paul Summers, TDOC Staff Attorney Baker and Assistant Attorney General Jordan filed a petition for the

appointment of a conservator in state court. In this petition the State conceded Mr. Thompson's long history of mental illness and asserted that he was "incapable of making rational decisions." (Attachment P, Petition to Appoint Conservator 3/14/01).

On June 26, 2001, the State of Tennessee, through TDOC Staff Attorney Baker, denied a request for medical records made by Mr. Thompson's counsel. The basis for the denial of records is the release form which accompanied the request. The State of Tennessee's position was that the release form signed by Mr. Thompson was invalid in light of the appointment of a conservator. (Attachment Q, Letter 6/26/01). The State alleged that Mr. Thompson's mental state was so depreciated that it rendered a signed release form for medical records invalid.

On October 16, 2001, Assistant Attorney General Jordan represented to the Seventh Circuit Court of Davidson County, Tennessee that the Tennessee Department of Corrections believes Mr. Thompson is incompetent. (Attachment R, Transcript, p. 9, Hearing 10/16/01).

D. The state court has recognized the inter-related nature of the state and federal proceedings.

The state court has recognized the gravity of the conservatorship action and its relationship to Mr. Thompson's death sentence calling the state proceeding

"very germane, at the very least collateral, to the sentence because the sentence is death." (Attachment D, Transcript 1/25/02 p. 87-90). The state court reasoned:

> Yet for the State to carry out the death sentence, at the time of his execution, he must be competent. ... I think it would be a terribly narrow interpretation for me to say that determining today whether he does or does not need a conservator, whether he does or does not need this medication, and that that doesn't have anything to do with whether he is or is not competent for the carrying out of the sentence, I think that would be one of the worst cases of my prejudging something without ever hearing the evidence.

On another occasion, the state court noted the impropriety of the state attorneys in the conservatorship action freely sharing Mr. Thompson's medical information with the state attorneys that are seeking to enforce Mr. Thompson's death sentence. (Attachment E, Transcript p. 76-84, 8/28/02). To prevent further harm, the Court imposed a "Chinese wall" to prevent such a free flow of information. (Attachment S, Order p. 3-4, 10/9/02). Clearly, the state court realized the nexus between the state and federal proceedings, as did this Court when it entered its expanded appointment order.

E. <u>The state court conservatorship proceeding is directly related to federal court proceedings.</u>

The above examples demonstrate the inter-related nature of the state court proceedings and federal court proceedings in Mr. Thompson's case. It is imperative that Mr. Thompson have continuity of counsel in these proceedings to

effectively represent him and litigate his claims, including his future *Ford* claim. To require Mr. Thompson to attempt to secure different counsel for the state proceedings not only compromises his federal court litigation and places a distinct disadvantage upon him not shared by the State, but, in all probability, it would leave him without counsel. Because the state court proceeding is ancillary to Mr. Thompson's federal proceedings this Court's previous appointment order should remain in effect. The motion to reconsider should be denied.

V. WITH THIS COURT'S PERMISSION, WHICH HAS ALREADY BEEN GRANTED, FDSET IS AUTHORIZED TO REPRESENT MR. THOMPSON IN THE STATE COURT PROCEEDING.

FDSET is authorized to represent its clients in ancillary state court proceedings. First, the Criminal Justice Act, 18 U.S.C. § 3006A(c), provides:

> A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, *including ancillary matters appropriate to the proceedings.*

(Emphasis added). The Criminal Justice Act Plan approved by this Court provides representation "for financially eligible persons in ancillary matters appropriate to the proceedings pursuant to subsection (c) of the CJA." (Attachment T, CJA Plan p.5).

Second, 21 U.S.C. § 848(q)(8) directs that:

> ...each attorney so appointed *shall* represent the defendant *throughout every subsequent stage of available judicial proceedings*, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, *and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.*

(Emphasis added). "The statute's plain meaning concerning the payment of fees *without reference to the forum* is made clear by the congressional directive that federally appointed counsel represent the defendant in competency and clemency matters," and other proceedings which ordinarily occur in state forums in connection with a federal habeas case. *Gordon v. Vasquez*, 859 F.Supp. 413, 418 (E.D.Cal. 1994)(emphasis added) *citing Hill v. Lockhart*, 992 F.2d 801, 803-804 (8th Cir. 1993)(the statute requires provision of attorneys for competency and clemency proceedings even though they are 'frequently [] not commenced until state and federal post conviction relief have been denied') *aff'd in relevant part Calderon v. U.S. District Court (Gordon)*, 107 F.3d 756 (9th Cir. 1997)(district court may consider whether granting a fees request under section 848(q)(9) for investigation of petitioner's state court case will assist the defendant in preparing for his federal habeas efforts as this request is authorized in "any post-conviction proceeding" under the federal habeas corpus statutes and section 848(q)(5)-(9));

see also Hickey v. Schomig, 420 F.Supp.2d 793, 795 (N.D.Ill. 2002)(holding that the plain language of § 848(q)(8) does extend to state proceedings). Moreover, Congress' use of the broad, flexible phrase "all available post-conviction process and ... other appropriate motions and procedures, and... such competency proceedings and proceedings for . . . clemency as may be available to the defendant" further indicates that it meant state court proceedings, which vary greatly from state to state, rather than the proceedings uniformly available to federal capital defendants.

Third, the Judicial Conference Committee on Defender Services also permits community defender appearances in state court to represent an individual under a state-imposed death sentence in a state proceeding when "a presiding judicial officer in a federal judicial proceeding involving the individual has determined that such use of Defender Services appropriation funds is authorized by law." The Committee has defined "appearance" to mean "an involvement in a state court proceeding ancillary to a 28 U.S.C. § 2254 capital action." (Attachment U, Administrative Office Memorandum 9/20/00 re: state court appearances ancillary to federal habeas corpus representations). Such ancillary proceedings "include: motions for stay of execution in state court; matters pertaining to exhaustion of remedies in state court; pleadings related to successor

post-conviction litigation; and motions concerning various other activities." (*Id.*). Under these provisions and with this Court's permission, FDSET is clearly authorized to appear in state court on Mr. Thompson's behalf.

Fourth, Federal Defenders are authorized to appear in ancillary state court proceedings even if federally funded private counsel are not. Aside from the *House* decision which is not yet final, the only cases touching on the appearance of federally-paid counsel in state court, *see, e.g., In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989), reveals why that is so. *Lindsey*, as well as the other cases interpreting the scope of the "ancillary matters" provisions of 18 U.S.C. § 3006A, does not address the authority of federal defender attorneys to appear in state court, rather whether private attorneys appointed under the CJA should be compensated for activities undertaken in state court. As the nature of those decisions makes clear, any limitations which might be implied from the language of the CJA are not limitations on activity or authority, but limitations on federal compensation for those activities.[7]

---

[7]Because these provisions at most limit the availability of compensation, the State no more has standing to seek to "enforce" those provisions than it would to challenge FDSET's issuance of a paycheck to undersigned counsel. Similarly, this court has no more authority to act upon that request than it would to prevent that paycheck from being issued. *Calderon v. U.S. District Court (Gordon)*, 107 F.3d 756, 761 (9th Cir. 1997).

It is, therefore, not surprising that federal defender organizations and federal public defenders often appear in state court. An extremely abbreviated computer research session reveals that these organizations have appeared as counsel of record in no less than 34 reported[8] state court proceedings.[9] The nature of these proceedings range from the litigation of claims of constitutional error (as is the case here), *In re Coleman*, 95 Ohio St.3d 284, 767 N.E.2d 677 (Ohio 2002), to seeking to set aside orders in divorce cases. *Matter of Marriage of Hampshire*, 261 Kan. 854, 934 P.2d 58 (Kan. 1997). Their appearances have occurred in jurisdictions as remote as Montana, *State v. Leifert* 309 Mont. 19, 43 P.2d 329 (Mont. 2002), and as near as our own state of Tennessee, *Coleman v. State*, 3 S.W.3d 19 (Tenn.Crim. App. 1998).

By representing its client, Mr. Thompson, in ancillary state court proceedings FDSET is simply engaging in activities routinely undertaken by federal defenders throughout the country. The motion to reconsider should be denied.

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[8]That figure does not reflect the obviously much larger number of instances where federal defender organizations and/or federal public defenders have appeared in lower courts or courts whose proceedings are not memorialized in the court reporters.

[9]*See*, Attachment V, Memorandum in Support of Response to Motion to Preclude, 7/23/02, Attachment A.

WHEREFORE, because the State's motion lacks standing, legal and moral authority and because it is proper under the governing rules that FDSET continue to represent Mr. Thompson in this ancillary state court proceeding, Mr. Thompson respectfully suggests that the Court's order of July 26, 2002, should not be disturbed and the State's motion should be denied.

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By Dana C Hansen
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CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing document was mailed to:

Jennifer L. Smith, Esquire
Office of Attorney General and Reporter
Criminal Justice Division
P. O. Box 20207
Nashville, TN 37202

this the 27th day of August, 2003, by postage prepaid delivery.

Dana C Hansen
Dana C. Hansen

APPENDIX

"N"

CASE NO. 00-5516

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,

Petitioner-Appellant

v.

RICKY BELL, Warden,

Respondent-Appellee

On Appeal from the United States District Court for the
Eastern District of Tennessee, Chattanooga Division

**FINAL BRIEF OF APPELLANT,
GREGORY THOMPSON**

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ORAL ARGUMENT REQUESTED

minimize the effect of such drugs; the sedative Vistaril; and Ativan/Lorazepam and Valium to reduce agitation.

Post-conviction counsel repeatedly requested funds for mental health experts in order to plead and prove a claim of ineffective assistance of counsel. The prosecutor argued that post-conviction counsel were not entitled to experts at state expense. (R. 5: Glenn Pruden, Post-Conviction Transcript v. I, p. 16; Apx. 844). In support of the motion for funding, counsel submitted the affidavit of Dr. Gillian Blair. Dr. Blair's affidavit and post-conviction testimony reflected her need for a complete social history, additional testing and interviews before she could render an opinion on Mr. Thompson's mental status at the time of the crime, at trial, and at the present time. (*See generally* Dr. Blair, Post-conviction Transcript, v. II, pp. 199-219; Apx. 862). Dr. Blair opined that based on the Riverbend records, her test results from 1992, and the brief social history available, further investigation and examination of Mr. Thompson was required. Dr. Blair testified that since 1985 Mr. Thompson had shown a deteriorating mental status. (*Id.* at 209; Apx. 872). Mr. Thompson had been diagnosed with bipolar disorder, schizo affective disorder or schizophrenia. *Id.* She further testified that schizophrenia and bipolar disorder, indeed all forms of psychosis, generally begin in early adulthood, (*Id.* at 215; Apx. 878), which coincides with the timing of the instant offense. Dr. Blair stated that Mr. Thompson's troubles in the Navy just prior to the crime would suggest that he was becoming mentally ill at that time. (*Id.* at 216; Apx. 879). However, further

information was needed in order to render an opinion and diagnosis of Mr. Thompson at that time. Dr. Blair also stated that further evaluation of Mr. Thompson was necessary to determine his present competency. (*Id.* at 207; Apx. 870).

The post-conviction court denied funding for expert assistance at the post-conviction hearing. The court reasoned that funds were unnecessary because Petitioner had not shown a "need", further funding would result in a delay of the proceedings, and the issue was a matter of record. With regards to Dr. Blair's affidavit which demonstrated need for additional funding, the post-conviction court stated:

> I have now reviewed that affidavit and your motion is for funding ... It is my position at this time that information, her expertise, her opinions are already formed. You can simply subpoena her in...
>
> MR. FORD: Your Honor, can I point out in her affidavit, this doctor indicates she would like to be able to perform certain additional tests on our client to determine his competence at this time and states in there how much money approximately it would cost to perform those. Although I understand Your Honor indicating she has put opinions in this affidavit, she indicates she needs to do more testing and meet with him personally to do this in order to form a proper opinion in the matter ... That is one of our basis for request for funding.

(R. 5: Joseph E. Ford, Pretrial Hearing, Jan. 16, 1995, p. 6; Apx. 839). Defense counsel attempted to explain that Dr. Blair had formed preliminary opinions based on existing information. However, the existing information indicated a need for

further investigation, tests, and examination. (*Id.* at 7-8; Apx. 840). Defense counsel argued:

> She [Dr. Blair] concludes and this is really language taken from her affidavit, that if petitioner is found to be suffering from neurological or psychological impairments, it is likely that some degree of such impairment would have been existed at the time of the offense, and then she goes on about whether it is a present situation that the Court has referred to. I don't think she has really had sufficient – I know she hasn't spent sufficient time and has not conducted the tests.

(R. 5: Robert Warner, Jr., Pretrial Hearing, Jan. 16, 1995, p. 7; Apx. 840). The post-conviction court responded that further investigation and evaluation would constitute unnecessary delay. *Id.* at 8; Apx. 841). Moreover, the court opined that defense counsel had all the evidence they needed to present at the hearing. The court reasoned:

> ... we have gone through this proposition of motion for sufficient funding for expert investigative assistance. It's my view on that, and my view is fortified by reading your amended petition, I think most of these issues are matters of record that don't need further investigation. They just need to be brought before the Court from the record.

(R. 5: Judge William Russell, Pretrial Hearing, Jan. 16, 1995, p. 4; Apx. 838).

Although the post-conviction court found no "need" for further expert assistance, the court later used the fact that Dr. Blair could not express an opinion as to the issues of Mr. Thompson's mental health to limit Dr. Blair's testimony and, subsequently, to deny Mr. Thompson relief from his unconstitutional conviction and sentence. For example, throughout Dr. Blair's testimony the

prosecutor made repeated objections on the basis that Dr. Blair did not have an ultimate opinion. (R. 5: *See e.g.*, Post-conviction Transcript, v. II, pp. 208, 215, 216, 220, 259; Apx. 871, 878, 879, 883, 888). Although the post-conviction court allowed most of Dr. Blair's answers, it did so remarking that the weight of the testimony was specious. *See id.* The court, however, did not allow Dr. Blair to testify about mitigating circumstances.

> MR. WARNER: Would a condition such as you observed in Mr. Thompson, even if it was in an earlier stage at the time this offense was allegedly committed back in 1985, would that type of either – I'll use the word "behavior" or "condition" – would that have been the type of thing you would normally bring out as a mitigating factor if you were able to make a proper diagnosis?
>
> MR. WEITZMAN: Objection, speculation.
>
> THE COURT: Sustained.

(R. 5: Post-conviction Transcript, v. II, p. 220; Apx. 883). In its order denying post-conviction relief, the trial court found, "(1)... Present counsel presented no proof of mental problems on the part of Mr. Thompson that would have been a defense to the charge, or that would constitute a shield against execution." (R. 5: *Thompson v. State*, No. 24-736, Order and Memorandum Opinion denying relief, p. 3 (Cir. Ct. Coffee Co. 1995); Apx. 174). The court apparently found "no proof of mental problems" despite the fact that (1) the records from Riverbend were unchallenged by the prosecution, (2) Dr. Blair testified about Petitioner's diagnosis and treatment with powerful anti-psychotic drugs, and (3) Petitioner

repeatedly requested funding for additional expert services but was denied same by the court.

Likewise, the Court of Criminal Appeals denied Petitioner's ineffective assistance of counsel claim finding that Petitioner had failed to demonstrate prejudice from the failure of trial counsel to further investigate Petitioner's mental state. The Court of Criminal Appeals found:

> Petitioner has failed to establish that the head injuries had any effect upon his mental stability at the time of the murder. Further he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence. Because Dr. Blair declined to give an opinion on these important issues, the evidence does not preponderate against the trial court's finding that the defense attorneys were not ineffective.

Thompson v. State, 958 S.W.2d 156, 165 (Tenn.Crim.App. 1997) (emphasis added).

The state court findings penalizing Mr. Thompson for failing to present evidence he was prevented from obtaining is "objectively unreasonable." Moreover, the state court findings that Mr. Thompson "malingered" schizophrenia is an unreasonable fact determination. The district court erroneously deferred to the state court decision. In any event, the district court analyzed the state court decision using the "reasonable jurists" standard denounced by the Supreme Court. Remand is required for reconsideration of Mr. Thompson's claims under the appropriate standard of review.

II THE DISTRICT COURT ERRED IN DENYING MR. THOMPSON'S HABEAS PETITION WITHOUT A HEARING WHERE MR. THOMPSON DID NOT FAIL TO DEVELOP THE FACTUAL BASIS OF HIS CLAIMS IN STATE COURT.

The United States Supreme Court's decision in *(Michael) Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), construed 28 U.S.C. §2254(e)(2)'s rule prohibiting evidentiary hearings in federal habeas corpus cases to apply only where "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 120 S.Ct. at 1488. Elaborating on this point, the Court made clear that "[t]he question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." Id. at1490.

Mr. Thompson made a diligent and documented effort to develop the facts underlying his claims in state court proceedings by requesting resources to conduct an investigation and resources to obtain expert assistance and by requesting an evidentiary hearing in state court. *Id.* ("Diligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful. . . . [O]nly a prisoner who has neglected his rights in state court need satisfy [§2254(e)(2)'s exceptions]"). The state court did not provide the expert assistance necessary for Mr. Thompson to present his claims of constitutional error. When Mr. Thompson

attempted to secure appellate review of the denial of services, the courts denied, by design or inadvertence, a transcript of the hearing on the motion for expert services, thus (allegedly) precluding state review of the issue. Mr. Thompson should not be deemed to have "failed to develop" the facts, and §2254(e)(2) should not apply to preclude a hearing. *See Williams*, 120 S.Ct. at 1490 ("Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law"). The district court's erroneous decision finding otherwise is reviewed by this Court *de novo*.

Many of Mr. Thompson's efforts to obtain the information in his habeas petition and present the same to the state courts were outlined by the Tennessee Court of Criminal Appeals. *Thompson v. State*, 958 S.W.2d at 169-171. Mr. Thompson was never found to have been anything less than diligent in his attempts to discover this information.

As described more fully above in Issue I and referred to herein, Mr. Thompson was denied funding for mental health and investigative experts at trial and during state post-conviction proceedings. At his post-conviction proceeding Mr. Thompson filed an *ex parte* motion for funds to pay a mental health expert and an investigator. *Thompson v. State*, 958 S.W.2d at 169. The post-conviction judge, Judge Ewell, refused to grant an *ex parte* hearing, but allowed one to take place in open court. Id. at 170; (R. 5: Post-conviction Technical Record, p. 34,

Order; Apx. 141) The motion for expert funding was denied. *Thompson v. State*, *supra* at 169. Thereafter, Judge Ewell recused himself and Judge Perry was assigned to the case. *Id.* Petitioner filed another request for expert funds before Judge Perry. *Id.* Judge Perry stayed the motion pending a decision of the Tennessee Supreme Court in the *Owens* case.[3] *Id.* While awaiting the decision, Judge Perry was removed from the case and Judge Russell was assigned. *Id.* Mr. Thompson renewed his motion for expert funds on three separate occasions. *Id.* at 170-71. All were denied. *Id.* at 171; (R. 5: Post-conviction Technical Record, p. 262, Order, Apx. 142; R. 5: Post-conviction Technical Record, p. 292, Order; Apx. 160). When Mr. Thompson requested such services but was denied the same by the state post-conviction court, the Tennessee appellate courts, in affirming that denial, retroactively imposed the pleading and proof requirements from the *Owens* case which were not in existence at the time Petitioner made his request. *See Thompson v. State*, 958 S.W.2d at 169.

The Tennessee Court of Criminal Appeals denied further review of the issue because "[t]he transcript of the hearing on the motion for expert services conducted in front of Judge Ewell is not included in the record on appeal." *Id.* at 171. However, that same court had previously denied Mr. Thompson's motion

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[3] *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995), provided guidelines on how to request [expert] services and when the trial court should grant the services. *Thompson v. State*, 958 S.W.2d at 169.

for a transcript of the hearing. Judge Ewell's decision denying expert funds was the subject of Mr. Thompson's application for an extraordinary appeal to the Court of Criminal Appeals filed on August 9, 1991. *Id.* at 170. In that request Mr. Thompson pointed out that a motion had been filed and was pending requesting Judge Ewell to order the transcription of the hearing on expert services. Mr. Thompson expressly requested that, if Judge Ewell did not order the transcript, the Court of Criminal Appeals require transcription of the hearing. (R. 5: App. for Extraordinary Appeal of Trial Court's May 29, 1991 Order Denying Funds, p. 4-5; Apx. 148). That motion was never ruled upon before Judge Ewell recused himself and no transcript was ever ordered. The Court of Criminal Appeals denied the request for an extraordinary appeal. *Thompson v. State*, 958 S.W.2d at 170. Subsequently, on direct appeal from the post-conviction hearing, the Court of Criminal Appeals refused any review of the issue.

Under the Tennessee Rules of Appellate Procedure, Rule 24(a) regarding preparation of the record on appeal, "the parties need do nothing (other than order preparation of a transcript) if the full record is deemed necessary for the appeal." Comment to TRAP 24(a). Thus, Mr. Thompson fulfilled his duty to prepare the record on appeal when he requested an order for transcription of the proceedings at issue. In the order denying Mr. Thompson's motion for post-conviction relief, Judge Russell ordered the court reporter to prepare the transcript. (R.5, *Thompson v. State*, No. 24-736, Order and Memorandum Opinion denying relief p. 1; Apx.

174). Mr. Thompson acted diligently to present the issue for appellate review when he followed the required procedure. Yet contrary to state law, the state courts failed to order a transcript of the proceedings regarding Mr. Thompson's request for expert assistance and/or a portion of the proceeding was omitted because of clerical error. *See* TRAP Rule 26(b)("Nothing in this subdivision shall be construed to authorize dismissal of an appeal due to the errors or omissions of the clerk of the trial court."). Moreover the appellate court could have ordered the filing of the omitted transcript at anytime. TRAP Rules 26(b) and 24(e)(omissions in the record on appeal may be remedied at any time by the trial or appellate court).

Not only does the Tennessee Court of Criminal Appeal's opinion document much of the State of Tennessee's interference with Mr. Thompson's efforts to present his claims to the state courts, it's justification for that interference reveals the futility of Mr. Thompson's efforts to overcome the obstacles created by the State. The Tennessee court's refusal to review the denial of Mr. Thompson's expert services requests and the suggestion that it was somehow his own fault for not complying with the Owens decision is patently incorrect. *Owens* had not been handed down when Mr. Thompson was seeking services. In fact, on appeal the prosecution argued that because *Owens* had not been decided, Mr. Thompson was not entitled to expert services. *Thompson v. State*, 958 S.W.2d at 169. Notably the prosecution did not argue that Mr. Thompson's request for expert services

failed to meet the Owens requirements. In fact Mr. Thompson's requests clearly demonstrated a need for expert services.

Moreover, Respondent's own expert, Dr. Blau, has provided testimony at deposition which establishes not only how the state court's denial of adequate funding for expert witnesses interfered with and denied Mr. Thompson a full and fair opportunity to present his mental health claims to the state courts, but also the truth of each and every one of his allegations that such an opportunity was further obstructed when counsel for the state affirmatively presented false evidence and argument regarding Mr. Thompson's mental health during both trial and post-conviction proceedings. Dr. Blau stated under oath: (1) that in order to render a competent opinion regarding Mr. Thompson's mental condition a full neuropsychological evaluation and additional other testing are required (R. 86: Response to Motion for Summary Judgment, Attachment "D", Blau depo. at pp. 14 and 47; Apx. 530, 534); and (2) that a conclusion regarding whether Mr. Thompson had "malingered" mental illness could not be reached on the basis of the information and test results in Dr. Blau's possession (which, significantly, was more extensive than that which was in the possession of Dr. Watson of MTMHI and counsel for the State of Tennessee when he argued (and the state courts "found") both at trial and during state post-conviction proceedings that Mr. Thompson had "malingered" his mental illness). (*Id.* at 27-30; Apx. 531).

Given these admissions, there is simply no question but that: (1) the State of Tennessee's post-conviction counsel had no basis in fact for arguing that the records in his possession demonstrated that Mr. Thompson had "malingered" mental illness and, accordingly that the prosecution had deliberately misrepresented that evidence; (2) there is no basis in the record, as required under § 2254(d)(2), to support the Tennessee courts' corresponding "findings" that Mr. Thompson had "malingered" mental illness;[4] (3) Mr. Thompson's psychological expert during state post-conviction proceeding did require, as she so testified, further testing of Mr. Thompson to reach a conclusion regarding the presence of significant mental illness and/or statutory and non-statutory "mental health" mitigation under Tennessee law; and (4) the Tennessee court's refusal to allow such testing deprived Mr. Thompson of a fair hearing on the issue.

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[4] On direct appeal the state argued, and the court apparently accepted, the deposition testimony of Dr. Watson, a state employed expert, that Mr. Thompson "appeared" to malinger symptoms of schizophrenia was evidence of the absence of mental health mitigation. State v. Thompson, 768 S.W.2d 239, 244 (Tenn. 1989). At post-conviction, the state argued, and the court accepted, that it was not ineffective assistance of counsel for trial counsel to agree to the introduction of Dr. Watson's deposition because the possibility of malingering which Dr. Watson described in his deposition had been confirmed by prison records accumulated after Mr. Thompson's incarceration and that therefore Mr. Thompson could not show any prejudice from trial counsel's failure to protect Mr. Thompson's right to confront Dr. Watson. *Thompson v. State*, 958 S.W.2d . at 167-168. Now that Mr. Thompson has received expert psychiatric assistance, it is known that the MTMHI testing is invalid and prison records document Mr. Thompson's legitimate mental illness.

Mr. Thompson made a diligent effort to present to the state courts the facts he is now able to present to this Court (because the federal government has now afforded him the resources necessary). They were not presented to the state courts or to the extent they were presented were rejected by the state courts solely because the State of Tennessee denied Mr. Thompson the necessary expert resources. Fault cannot be attributed to Mr. Thompson. The case should be remanded for an evidentiary hearing on Mr. Thompson's claims which required the assistance of experts to plead and prove including his claims of ineffective assistance of counsel, (R. 17: habeas petition claim ¶ 22; Apx. 355), competency at the time of the offense and to stand trial, (R. 17: habeas petition claim ¶ 21; Apx. 353), and *Brady/Giglio* claim (R. 17: habeas petition claim ¶ 41; Apx. 341).

III THE DISTRICT COURT ERRED BY MAKING FACTUAL FINDINGS WITHOUT AFFORDING MR. THOMPSON THE OPPORTUNITY TO PRESENT EVIDENCE WITH REGARDS TO THOSE FINDINGS.

The district court's grant of summary judgment is reviewed *de novo*. *Weberg v. Franks*, 229 F.3d 514 (6th Cir., October 10, 2000), *citing Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir.1996).

Summary judgment is proper only if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court is "required to view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party." *Weberg*,

APPENDIX

"O"

CASE NO. 00-5516

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

On Appeal from the United States District Court for the Eastern District of Tennessee, Chattanooga Division

FINAL REPLY BRIEF OF APPELLANT, GREGORY THOMPSON

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ORAL ARGUMENT REQUESTED

I THE DISTRICT COURT ERRED WHEN IT REVIEWED THOMPSON'S CLAIMS UNDER THE "ALL REASONABLE JURISTS" STANDARD DENOUNCED BY THE SUPREME COURT IN *WILLIAMS v. TAYLOR* TO SUMMARILY DENY THOMPSON'S PETITION.

In his brief Respondent initially takes issue with Thompson's assertion that the state court decision does not constitute an "adjudication on the merits" under 28 U.S.C. § 2254(d). Thompson has argued that since the state courts denied him the proper resources and a full opportunity to litigate his claim there was no "adjudication on the merits." *See e.g. Neal v. Gramley*, 99 F.3d 841, 843 (7th Cir. 1996), *cert. denied*, 522 U.S. 834, 118 S.Ct. 104, 139 L.Ed.2d 58 (1997); *Lindh v. Murphy*, 97 F.3d 856, 871 (7th Cir. 1996), *reversed in other part*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Thompson's point is strengthened by *Williams (Terry) v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the Supreme Court noted that federal analysis under § 2254(d) relies heavily on the reasons the state court put forth for denying the writ. The *Williams* Court stated that the text of the "contrary to" portion of § 2254(d)

> suggests that the state court's decision must be substantially different from the relevant precedent of this court. A state court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law in our cases.

Id. at 405. Analysis of an "unreasonable application" of Supreme Court precedent also depends on the reasons the state court gave for its decision:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it would apply.

Id. at 407.

Williams is important in light of what constitutes the "merits of an action":

> The merits of an action are not concerned merely with the proven facts of a case but encompass the application of law to the claims, motives, causes and substantial grounds of action as distinguished from matters of practice, procedure, jurisdiction or form.

Stitzer v. University of Puerto Rico, 617 F.Supp. 1246, 1256 (D.C.P.R. 1985).

Where the state court decision rests on an inadequate opportunity to view the facts and to make an enlightened decision based on those facts, *Williams* implies that no "adjudication on the merits" has occurred. Where the state courts improperly restrict the prisoner's right to properly present a particular claim, they cannot have viewed the "substantial grounds" of that claim, and thus cannot have properly applied any controlling Supreme Court law to the claim. Consequently, they

"cannot be held to have adjudicated" the claim on its merits. *See e.g. Washington v. Schriver*, __F.3d __, 2001 U.S.App. LEXIS 129, slip op. at 22 (2nd Cir. 2001).

Precisely that occurred here. The state courts deprived Thompson of proper funding for expert assistance. The deprivation may be seen in the affidavit of Dr. Gillian Blair, a neuropsychologist who partially evaluated Thompson during his state post-conviction proceedings. Dr Blair therein asserted that Thompson showed manifest signs of mental illness, including:

> low level auditory hallucinations, impaired insight and judgment and compromised coherence to a frankly psychotic state...
>
> If Thompson is found to be suffering from neurological or psychological impairment as described above, it is likely that some degree of such impairment would have existed at the time of the offense and would have been a significant factor in determining whether or not Thompson was able to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law when he committed the homicide of which he stands convicted...It would also have been significant mitigating evidence which should have been considered in the determination of whether a penalty less than death was appropriate in his case...
>
> In order to arrive at an adequate understanding of Thompson's neurological and psychological condition, it would be necessary to administer a full battery of tests and conduct a mental status interview...[A] complete social and medical history must be compiled in order to adequately document Thompson's psychological development, incidents of trauma, and evidence of pre-existing conditions...

(R. 112; Memorandum of Law in Support of Petitioner's Application for

Extraordinary Appeal of the Trial Court's Order Dated May 29, 1991, Denying Funds for Expert Assistance, Exhibit M, Affidavit of Dr. Blair, p. 2-4; Apx. p. 635). However, the state courts denied Thompson the funding Dr. Blair confirmed would be necessary; thus Petitioner was unable to present full evidence of his mental status at the time of the offense. The state courts then rendered a decision without the benefit of evidence that would have been presented had proper funding been approved. This is not an adjudication on the merits under *Washington* and *Williams*. Consequently, pre-AEDPA law must be used in the federal courts – which entails *de novo* review.

In the alternative, even if the AEDPA must be used, the district court failed to apply § 2254(d) in the manner prescribed by *Williams*, since a subjective standard of review disapproved by the *Williams* court was used to evaluate Thompson's petition. *Williams*, 529 U.S. at 409-10. Respondent acknowledges this, but urges that remand is unnecessary (Respondent's Brief, p. 22-3) since "this Court is bound to apply the standard set forth by the Supreme Court in Williams for its analysis under § 2254(d)." (Respondent's Brief, p. 25).

However, the cases Respondent cites in support of his suggestion that no remand is necessary provide little support for that notion. *Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000) (Respondent's Brief, p. 23) was not remanded although an

incorrect standard was used below, because the petitioner would have failed to meet his § 2254(d) burden anyway – there was no Supreme Court authority with which to measure the state court's decision when determining whether the latter was "contrary to" or an "unreasonable application of" the former. *Harris*, 212 F.3d at 945. *Hammon v. DHL Airways*, 165 F.3d 441 (6th Cir. 1999) (Respondent's Brief, p. 23) also was not remanded, but only because the district court's analysis – although erroneous – was sufficiently close to the correct standard of review that affirmance was proper. *Hammon*, 165 F.3d at 445. In Thompson's case the district court's standard of review was materially different from the proper one, as *Williams* explicitly made clear. And in *Fryman v. Federal Crop Insurance Corporation*, 936 F.2d 244 (6th Cir. 1991) (Respondent's Brief, p. 23), an erroneous jury instruction had been corrected by the magistrate's grant of a new trial – thus even though the new trial order had been achieved via a "circuitous route," there was little about which the appellant could complain on that matter. Remand would thus have been inappropriate. *Fryman*, 936 F.2d. at 250.

On the contrary, in Thompson's situation the Court has previously required remand for new analysis. In *Cox v. Kentucky Department of Transportation*, 53 F.3d 146, 149 (6th Cir. 1995), for example, the district court had granted summary

judgment on two claims, which this Court reviewed *de novo*. *Cox*, 53 F.3d at 149. Since the district court had used an erroneous standard to review one of the issues, that claim was appropriately remanded for new analysis:

> Because the district court applied the incorrect legal standard to the evaluation of the § 1983 cause of action, this court reverses and remands on that issue.

Id.

In sum, remand of Thompson's petition for new analysis under an objective standard of reasonableness is appropriate and necessary.

II THE DISTRICT COURT ERRED IN DENYING THOMPSON'S HABEAS PETITION WITHOUT A HEARING WHERE THOMPSON DID NOT FAIL TO DEVELOP THE FACTUAL BASIS OF HIS CLAIMS IN STATE COURT.

Respondent argues that an evidentiary hearing on Thompson's mental health claims is not warranted solely because the transcript of a May 17, 1991, hearing on the defense request for experts was not included in the record on appeal.[1] (Respondent's Brief, p. 38). This argument amounts to nothing more than a distraction. The transcript is irrelevant to the record on appeal because the only alleged purpose for its inclusion is for the state court's *Owens* analysis -- an analysis that necessarily imposes retroactive requirements upon Thompson and therefore is an inadequate basis for denying relief in federal court. (*See* Petitioner's Brief, p. 35, 37-38).

The state court decision which retroactively imposes requirements upon Thompson's expert services request in order to deny Thompson's due process claim regarding denial of expert services states in full:

> Now, the petitioner argues that he was denied his right to due process by the trial court's failure to authorize the funds for a

---

[1]Respondent argues in the alternative that if §2254(e)(2) is inapplicable "a hearing was not required because Thompson failed to present evidence demonstrating a material factual dispute in response to the State's motion for summary judgment." (Respondent's Brief, p. 39-40). Thompson directs the Court to his argument in Section III *infra* for an in-depth discussion of the expert opinions rendered in Thompson's case which demonstrate that material issues of fact do exist.

psychologist or psychiatrist and an investigator. He contends the original order denying services was rendered void when Judge Ewell recused himself. The petitioner insists that the services were necessary to establish the ineffectiveness of trial counsel by failing to pursue and present significant mitigating evidence.

This court may not review this issue. The transcript of the hearing on the motion for expert services conducted in front of Judge Ewell is not included in the record on appeal. *Owens* clearly contemplates a presentation of proof: "The trial court should grant the motion if, at the hearing, the petitioner demonstrates that investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights." *Owens*, 908 S.W.2d at 928. Without a record of the hearing, this court cannot determine whether Judge Ewell erred by denying the motion. See Edward Jerome Harbison, 1996 Tenn.Crim.App. LEXIS 307, *26, No. 03C01-9204-CR-00125 (Tenn.Crim.App., at Knoxville, May 20, 1996), app. denied, (Tenn., Nov. 12, 1996).
This court may not review this issue.

Thompson v. State, 958 S.W.2d 156, 171 (Tenn.Crim.App. 1997). It is clear from the reasoning of the state court decision that it was requiring the transcript in order to evaluate Thompson's claim under *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). Because the rules of procedure set forth in *Owens* were issued after Thompson's post-conviction evidentiary hearing any perceived failure to comply with *Owens* at that time is inadequate to bar federal court consideration of the issue. *See Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Ford v. Georgia*, 498 U.S. 411, 423- 425, 111 S.Ct. 850, 112 L.Ed. 2d 935 (1991); *James v. Kentucky*, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d

346 (1984); and case law discussed in R. 86: Response in Opposition to Motion for Summary Judgment, p. 11-14; Apx. 485.

The rule used by the state court to analyze Thompson's claim was first announced on October 23, 1995, in *Owens v. State*. The *Owens* decision consolidated two cases in which post-conviction defendants appealed the trial courts' denial of expert services. *Owens v. State*, 923 S.W.2d 923, 925 (Tenn. 1995). The appellants argued that capital post-conviction litigants were entitled to expert services under Tenn. Code Ann. §40-14-207(b); a provision governing state-funded expert services in capital trials. The State of Tennessee argued that there was no right to state-funded support services in post-conviction capital cases under any authority, inherent, statutory, or constitutional. *Id.* at 926. The Tennessee Supreme Court noted prior precedent to the contrary, however, it concluded that both the State and the Court of Criminal Appeals interpreted the statutes at issue too narrowly, *id.* at 928, and held that Tenn. Code Ann. §§ 40-14-207(b) applies to capital post-conviction cases. *Id.* at 929. Clearly Thompson's proceedings, which took place in May 1991 -- before *Owens* was rendered, could not be adequately judged by the rule in *Owens*. *Owens* was neither firmly established nor regularly followed at that time which allowed the State to argue on appeal in 1997 that because *Owens* had not been decided earlier Thompson was

not entitled to expert services. *Thompson v. State*, 958 S.W.2d at 169.

Respondent largely ignores the inadequacy of the *Owens* rule. Respondent briefly acknowledges the issue in a footnote but argues that Thompson "misapprehends the *Owens* decision," because "*Owens* ... simply ... applied the provisions of Tenn. Code Ann. §40-14-207(b) ... to post-conviction capital cases." (Respondent's Brief, p. 35-36 n. 10). However, that is precisely the point. Prior to *Owens* no state court had held post-conviction capital litigants to the standards of §40-14-207(b) and, in fact, state courts had held the opposite; that post-conviction capital litigants were not entitled to state-funded experts. *See e.g.*, *Teague v. State*, 772 S.W.2d 915 (Tenn. Crim. App. 1988), *perm. app. denied* (Tenn. 1989). Thompson was denied expert services in the lower state courts on the basis of *Teague v. State*. (R. 112; *supra* p. 3, p. 8-10; Apx. 485). Any perceived failure to develop the facts under *Owens* is inadequate to bar an evidentiary hearing in federal district court.

Respondent further states in the footnote that "Thompson argued in his application for extraordinary appeal to the Court of Criminal Appeals that he had satisfied those requirements at the May 17, 1991 hearing." (Respondent's Brief, p. 35-36 n. 10). Although Thompson argued that he had demonstrated a "compelling need" for expert services (R. 112, *supra* p. 3; Apx. p. 485) and argued a due

process right to services under *Ake v. Oklahoma*, (*Id.* at p. 9-10; Apx. p. 485), Thompson did not argue that he had satisfied the requirements of *Owens* or §40-14-207(b) because that state law was not established with regards to capital post-conviction litigants. Moreover this observation lends little to the analysis regarding the adequacy of the *Owens* rule.

Instead of directly addressing the adequacy of *Owens*, Respondent argues that Thompson failed to develop his constitutional claim regarding denial of expert services because the transcript of the May 17, 1991, hearing on expert services was not included in the record on appeal. In order to attribute "a lack of diligence, or some greater fault," to Thompson, *Williams (Michael) v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 1488, 146 L.Ed.2d 435 (2000), Respondent cites two state court decisions which generally hold that the appellant has a duty to prepare the record of the proceedings relevant to the issues presented for review; *State v. Bunch*, 646 S.W.2d 158 (Tenn. 1983) and *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993). However, both *Bunch* and *Ballard* are distinguishable from Thompson's case in that neither of those opinions indicate that the appellant had taken any steps to prepare the relevant transcripts for appeal. Given the wholesale negligence of the appellants in *Bunch* and *Ballard* the Tennessee Supreme Court precluded review of the issues not fully documented by the appellate record. In

the instant case, however, Thompson took affirmative steps to request that the transcript of May 17, 1991, be included in the record on appeal. Thompson filed a motion for transcription of the hearing. It requested:

> Comes now the Petitioner, Gregory Thompson, and pursuant to T.C.A. §40-14-312 requests that the court provide the verbatim transcript of the evidentiary hearing held on May 17, 1991. Petitioner would show to the court that this transcription is necessary for providing a complete record of the proceeding to the Court of Criminal Appeals. This court has previously found Petitioner to be indigent.

(R. 112: *supra* p. 3; Apx. 485). This motion did not limit the requested transcript for the purposes of the extraordinary appeal. Respondent's attempt to so limit the request, as evidenced by his argument in footnote 11, p. 38 of Respondent's Brief, is belied by the record. The motion clearly states that the transcript is "necessary for providing a complete record of the proceedings to the Court of Criminal Appeals." *Id.* In any event, unlike the appellants in *Bunch* and *Ballard* Mr.Thompson fulfilled his duty or at least was diligent in preparing the record for appeal.

Moreover, despite the great distraction caused by Respondent's eight-page argument regarding the missing transcript, in the end distraction is all that is accomplished. The record establishes that Thompson's showing of need for expert services at the May 17, 1991, hearing was undisputed. Thompson's Memorandum

of Law in Support of Petitioner's Application for Extraordinary Appeal of the Trial Court's Order Dated May 29, 1991, Denying Funds for Expert Assistance and its supporting affidavits reveal the substance of the May 17, 1991, hearing. (R. 112; *supra* p. 3, and R. 5 Post-conviction Technical Record, Affidavits of Brock Mehler and Dr. Gillian Blair p. 439, 434; Apx. 485, 133 and 129). The Memorandum sets forth in part:

> The compelling need for expert assistance in this case is undisputed. The affidavits of Brock Mehler, an investigator and mitigation specialist with the Capital Resource Center, and Dr. Gillian Blair, a licensed psychologist, attest to this need and were previously filed with the trial court. Neither affidavit has been disputed by the State of Tennessee. Both affidavits are also attached for this court's consideration as Exhibits N and M respectively.
>
> An evidentiary hearing on Petitioner's Motion for Funds for Expert Assistance was held on May 17, 1991. At that hearing, Dr. Gillian Blair testified that in her professional opinion, there is evidence that Gregory Thompson may have been mentally incompetent at the time the offense occurred. Dr. Blair substantiated that a number of areas regarding Thompson had not been investigated in his prior history and additional examination of his past was required.
>
> Dr. Blair further opined that based upon her review of Thompson's medical records and correspondence, his current mental competence is impaired and distorted. Thompson's medical records compiled since his trial reflect Gregory Thompson's rapidly deteriorating mental condition. Such deterioration is consistent with the theory that Thompson's mental condition at the time the offense occurred was impaired.
>
> Significantly, the State of Tennessee did not contest Dr. Blair's testimony, nor did the State of Tennessee seek to rebut, or otherwise contradict the testimony during the evidentiary hearing held on May

17, 1991. The State of Tennessee filed no affidavits and presented no proof that contradicts the evidence of the compelling need for expert assistance.

Id. at p. 3-4 (emphasis supplied). Thus, even if it were permissible for the state courts to engage in an *Owens* analysis of Thompson's expert services request, it is clear that on the record as it exists Thompson would have satisfied the *Owens* requirements for state-funding.

Additionally, although Respondent fails to mention it, Thompson renewed his request for expert funds one month prior to the evidentiary hearing. (R. 5: Post-conviction Technical Record p. 438; Renewed Motion for Funds for Expert Assistance; Apx. 172). Attached to that motion was a second affidavit from Dr. Blair detailing the need for funding. Notably Dr. Blair stated,

> Thompson's observed behaviors at the time of the 1985 assessment, and his acknowledgement of auditory hallucinations, set in the context of a complete social history (including psychiatric disturbance in his family of origin) could have been presented to the Jury as mitigation. Thompson's escalating mental status since 1985 highlights the relevance of such information.

(Id. at p. 4; Apx. 172).

In short, Thompson was diligent in developing his mental health claims in state court.[2] An evidentiary hearing is warranted.

---

[2]The District Court's dismissal of Claim 21, competency at trial and the crime, on procedural default grounds is likewise erroneous. *Pate v. United States*,

III THE DISTRICT COURT ERRED BY MAKING FACTUAL FINDINGS WITHOUT AFFORDING THOMPSON THE OPPORTUNITY TO PRESENT EVIDENCE WITH REGARDS TO THOSE FINDINGS.

The district court granted Respondent's motion for summary judgment by crediting the opinions of Respondent's experts over Thompson's experts and by disregarding the findings of the Thompson's experts that he was schizophrenic when he committed the offense.

At the state post-conviction hearing Dr. Gillian Blair testified on Thompson's behalf. Dr. Blair, an in the field of neuropsychology and forensic psychology, was hired to evaluate Thompson. Before meeting him, she reviewed his prison medical record, which

> indicated that since 1985, Thompson had shown a deteriorating mental status. He had become psychotic. He had been treated with anti-psychotic medication at that time.

(R. 5: Post-conviction Transcript, 3/29/95, v. II, p. 209; Apx. 842). Each of three psychiatrists

> over the years from 1985 to 1990 had diagnosed him as either having a bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of

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383 U.S. 375, 384, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Nguyen v. Reynolds*, 131 F.3d 1340, 1346 (10th Cir. 1997).

(3)

No. 04-514

Supreme Court, U.S
FILED
NOV 30 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

In opposing certiorari, respondent insists that review is unwarranted because (1) a motion filed by petitioner, but never ruled upon by the Sixth Circuit, constituted "good cause" to withhold issuance of the mandate despite the mandatory language of Fed. R. App. P. 41(d)(2)(D), (2) the federal district court had already issued an order staying Thompson's execution while he litigated his competence-for-execution claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), and (3) the threshold requirements for an evidentiary hearing under 28 U.S.C. §2254(e)(2) are inapplicable to his case. None of respondent's arguments is sound.

1. Respondent argues that, because the petitioner failed to take "steps to attempt to finalize the federal [habeas] case," the Sixth Circuit should not be faulted for its failure to comply with the requirement of Fed. R. App. P. 41(d)(2)(D) that the mandate issue "immediately" upon the filing of an order of this Court denying certiorari review. Specifically, he asserts that a motion filed with the Sixth Circuit in August 2003, but never ruled upon by the court, in which petitioner sought reconsideration of an order appointing Federal Defender Services of Eastern Tennessee, Inc., to represent Thompson in an unrelated state-court proceeding, relieved the Sixth Circuit of its obligation to issue the mandate. (Brief in Opposition, pp. 21-22) Respondent points to no rule or decision of this Court supporting his contention that petitioner was under any affirmative obligation to "finalize" proceedings or "move for issuance" of the mandate; rather, Rule 41(d)(2)(D) requires *immediate* issuance of the mandate upon the filing of an order denying certiorari review of the judgment of the court of appeals. The fact that the Sixth Circuit failed to dispose of a properly-filed motion in a timely

manner does not excuse non-compliance with the unambiguous requirement of Rule 41. Indeed, the state-court proceeding at issue in petitioner's motion was concluded in October 2003 through termination of Thompson's court-appointed conservatorship, thus rendering disposition of petitioner's motion moot. Moreover, it was unnecessary for petitioner to challenge the Sixth Circuit's action in a petition for rehearing in order to preserve the issue for review by this Court. The Sixth Circuit rules, in fact, make clear that the filing of a petition for rehearing "is not a prerequisite to the filing of a petition for writ of certiorari." 6 Cir. R. 35(b).

2. Respondent's contention that the Sixth Circuit's decision did not alter the posture of the case because Thompson's execution had already been stayed by the district court is misleading. (Brief in Opposition, pp. 23-24) Thompson's *Ford* claim was ripe for review by the state and federal courts *only* because of his imminent execution date. On June 14, 2004, following expedited competency proceedings in the Tennessee state courts, Thompson filed a petition for writ of habeas corpus under 28 U.S.C. §2254. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (*Ford* claim not "second or successive" petition; when execution not imminent, competency to be executed may not be determined at that time). Seven days later, on June 21, 2004, the district court entered a "brief stay" of Thompson's execution, with the stay to expire immediately upon issuance of an order of the court denying habeas relief but to remain in place upon issuance of an order granting the writ. The court further ordered the Warden to file a response to the *Ford* petition within ten days of the date of the order. Given the Tennessee Supreme Court's thorough treatment of the competency issue after considering the reports of Thompson's three

mental health experts (App. 352) and the highly deferential standard of review under 28 U.S.C. §2254(d), Thompson's *Ford* claim likely would have been resolved summarily in favor of the Warden. In any event, the Sixth Circuit's subsequent stay order (App. 6) not only removed any possibility that Thompson's execution would take place on August 19, 2004, as scheduled since February 2004, it nullified the state-court competency proceedings previously conducted in reliance upon that execution date.

3. Finally, respondent's contention that §2254(e)(2) has been rendered "inapplicable" to his case by subsequent state-court proceedings has no record support. To bolster his argument, respondent improperly relies upon and presents as Appendices to his Brief in Opposition materials outside the record in the case below, specifically, the Petition for Writ of Error Coram Nobis filed May 29, 2001, in the Circuit Court of Coffee County, Tennessee (Respondent's Appendix B, Attachments A-B), the Reply to Response to Petition for Writ of Error Coram Nobis filed on or about July 1, 2001 (Respondent's Appendix C, Attachments A-M), the Opinion and Order of the Coffee County Circuit Court filed September 5, 2001 (Respondent's Appendix D), and the Judgment and Opinion of the Tennessee Court of Criminal Appeals from the denial of Thompson's petition for writ of error coram nobis filed August 15, 2002. (Respondent's Appendices E and F) The first full paragraph under Part V of respondent's brief in opposition consists of argument based on those materials. Because the materials listed above are not part of the record in this case and thus not before the Sixth Circuit when it rendered its decision, neither they nor any argument based upon them is properly before this Court and provides no basis to deny certiorari. *See* Sup. Ct. R. 12.7 ("The clerk of the court having possession of the

record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court"); *see also Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record").

Moreover, the sole quotation from the lower court's opinion provided by respondent in support of his contention that the Sixth Circuit "substantially complied" with §2254(e)(2) is not contained within the majority opinion of the court, but in the concurring/dissenting opinion of a single judge.[1] (Brief in Opposition, p. 38) Because the opinion of the Sixth Circuit is devoid of any justification, explanation or limitation on its mandate that the district court conduct a "full evidentiary hearing" and is thus contrary to the provisions of §2254(e)(2) and this Court's decisions, certiorari is warranted under Sup. Ct. R. 10(a) and (c).

[1] Likewise, respondent's reliance upon Judge Suhrheinrich's "fraud on the court" determination as a basis for denying certiorari review is misplaced; it does not constitute an "alternative holding" of the court as asserted by respondent. (Brief in Opposition, pp. 33-34) *See also* Petition for Writ of Certiorari, p. 14 n.2.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(4)

No. 04-514

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JOINT APPENDIX

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Petition For Certiorari Filed October 14, 2004
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RELEVANT DOCKET ENTRIES

U.S. District Court
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CIVIL DOCKET FOR CASE #: 4:98-cv-00006

06/12/1998	7	PETITION FOR WRIT OF HABEAS CORPUS 28 USC 2254 by petitioner Gregory Thompson (AR) (Entered: 06/16/1998

* * *

02/17/2000	124	MEMORANDUM by Honorable R. Allan Edgar that the respondent's motion for sum judg will be granted as to all claims, and Thompson's petition and amended petition for writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254 (3 & 17) will be dismissed; Thompson is not entitled to an evidentiary hearing. (cc: all counsel) (AR) (Entered: 02/17/2000)
02/17/2000	125	ORDER by Honorable R. Allan Edgar GRANTING res's motion for sum judg (7); DISMISSING petition (3) for a writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254; CERTIFYING that any appeal would be frivolous; DENYING pet leave to proceed ifp on appeal; DENYING any application for a certificate of appeal-ability since pet has failed to make a substantial showing of the denial of a constitutional right; and that the STAY WILL REMAIN IN EFFECT pending any appeal; dismissing case. Ent'd as a Judgment, OB 29, pg 8 (cc: all counsel) (AR) (Entered: 02/17/2000)

* * *

04/21/2000 129 NOTICE OF APPEAL by petitioner Gregory Thompson from Dist. Court decision [128-1], [125-2] (cc: all counsel) (AR) (Entered: 04/21/2000)

* * *

03/02/2001 133 MOTION by petitioner Gregory Thompson under Fed.R.Civ.Pro. Rule 60(b) for relief from final order for purpose of supplementing the record. C/S (AR) (Entered: 03/02/2001)

03/07/2001 134 ORDER by Honorable R. Allan Edgar dismissing petitioner's motion [133-1] as TIME-BARRED. Winchester OB 30, pg 8; Chattanooga OB 87, pg 115 (cc: all counsel) (AR) Modified on 03/08/2001 (Entered: 03/07/2001)

* * *

03/14/2001 137 MOTION by petitioner Gregory Thompson to reconsider order denying petitioner's Rule 60(b) motion (See CF #134 C/S (AWH) (Entered: 03/14/2001

* * *

04/17/2001 139 MEMORANDUM AND ORDER by Honorable R. Allan Edgar denying Petitioner Thompson's motion to reconsider [137-1] (cc: all counsel) (AR) (Entered: 04/17/2001)

* * *

01/13/2003 143 INFORMATIONAL COPY of USCA OPINION AFFIRMING the judgment of the district court denying Thompson's petition for writ of habeas corpus; 6CA # 00-5516. (AR) (Entered: 01/13/2003)

01/13/2003 144 JUDGMENT from USCA AFFIRMING the judgment of the district court; 6CA #00-5516. (AR) (Entered: 01/13/2003)

* * *

12/15/2003 147 Copy of LETTER from U.S. Supreme Court to 6CA that an Order was entered 12/1/03 denying the petition for a writ of certiorari (AR) (Entered: 12/15/2003)

01/29/2004 148 Copy of LETTER from U.S. Supreme Court dated 1/20/04 to U.S. Court of Appeals, Sixth Circuit, that an Order entered denying the petition for rehearing, Supreme Court # 03-5759, 6CA # 00-5516 (AR) (Entered: 01/29/2004)

* * *

General Docket

US Court of Appeals for the Sixth Circuit

Docket # 00-5516

4/24/00 Death Penalty Case Docketed, with certificate of appealability denied. Notice filed by Appellant Gregory Thompson. Transcript needed: y ☐ (yh)

* * *

9/12/00 ORDER filed granting motion to grant certificate of appealability [2158722-1] filed by Stephen M. Kissinger [00-5516]. Entered by order of the court. (yh)

* * *

11/20/00 PROOF BRIEF filed by Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date 11/16/00 Number of Pages: 70. [00-5516] ☐ (lak)

* * *

2/16/01 PROOF BRIEF filed by Jennifer L. Smith for Appellee Ricky Bell. Certificate of service date 2/15/01. Number of Pages: 80. [00-5516] ☐ (lak)

* * *

3/2/01 Appellant MOTION filed to hold case in abeyance pending appellant's contemporaneous 60(b) motion in the district court. Motion filed by Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date 3/1/01 [00-5516] (yh)

* * *

3/8/01 Copy of District Court Order filed dismissing as time barred, the petitioner's motion to alter or amend judgment pursuant to F.R.C.P. 60(b). [00-5516] (yh)

3/9/01 APPENDIX filed by Dana C. Hansen for Appellant Gregory Thompson. Copies: 5. Certificate of service date 3/8/01 [00-5516] (lak)

3/12/01 PROOF REPLY BRIEF field by Dana C. Hansen for Appellant Gregory Thompson Certificate of service date 3/9/01 [00-5516] (lak)

* * *

3/20/01 FINAL BRIEF filed by Dana C. Hansen for Appellant Gregory Thompson. Copies: 7. Certificate of service date 3/19/01 Number of Pages: 70. [00-5516] (lak)

3/21/01 ORDER filed denying motion to hold case in abeyance pending district court ruling on 60(b) motion filed by Dana C. Hansen [00-5516]. Entered by order of the court. (yh)

3/21/01 FINAL BRIEF filed by Jennifer L. Smith for Appellee Ricky Bell. Copies: 7. Certificate of service date 3/20/01. Number of Pages: 82. [00-5516] (lak)

* * *

3/26/01 FINAL REPLY BRIEF filed by Dana C. Hansen for Appellant Gregory Thompson. Copies: 7 Certificate of service date 3/19/01 Number of Pages: 43. [00-5516] (lak)

* * *

11/1/01 CAUSE ARGUED on 11/1/01 by Dana C. Hansen for Appellant Gregory Thompson, Jennifer L. Smith for Appellee Ricky Bell before Judges Suhrheinrich, Moore, Clay. [00-5516] (me)

* * *

4/10/02 CERTIFIED RECORD filed with certificate of appealability denied. Volumes include 30 Tr; 3 Ex; 5 Pl. [00-5516] (laj)

7/3/02 Appellant ex parte MOTION filed to expand appointment of counsel to include state court proceedings. Motion filed by Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date [00-5516] (yh)

* * *

7/26/02 ORDER filed granting motion to expand appointment of counsel to include state court proceedings. [2580695-1] filed by Dana C. Hansen [00-5516]. Entered by order of the court. (yh)

1/9/03 OPINION filed: AFFIRMED, decision for publication pursuant to local rule 206 [00-5516]. Richard F. Suhrheinrich, Authoring Judge, Karen N. Moore, Eric L. Clay, Circuit Judges. Moore, J. concurring, Clay, J. dissents. (yh)

1/9/03 JUDGMENT FILED: AFFIRMED. (yh)

* * *

1/27/03 PETITION for en banc rehearing filed by Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date 1/22/03. [00-5516] (blh)

3/10/03 ORDER filed denying petition for en banc rehearing [2683674-1] filed by Dana C. Hansen [00-5516]. Richard F. Suhrheinrich, Karen N. Moore, Eric L. Clay, Circuit Judges. (blh)

3/14/03 Appellant MOTION filed to stay mandate pending petition for writ of certiorari. Motion filed by Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date 3/13/03 [00-5516] (yh)

3/24/03 ORDER filed granting motion to stay mandate [2709681-1] filed by Dana C. Hansen [00-5516]. Richard F. Suhrheinrich, Karen N. Moore, Eric L. Clay, Circuit Judges (yh)

4/3/03 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [00-5516]. Volumes included: 5 Pl; 31 Tr; 3 Ex. (laj)

* * *

6/11/03 U.S. Supreme Court letter filed: extension of time within which to file a petition for a writ of certiorari granted to and including 08-07-03 [2760764-1]. [00-5516] (swh)

8/15/03 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Gregory Thompson. Filed in the Supreme Court on 08-11-03. Supreme Ct. case number: 03-5759 [00-5516] (swh)

8/21/03 Appellee MOTION filed to reconsider order dated 7/26/02 granting ex parte motion for authorization to expand appointment of counsel to include state court proceedings. Motion filed by Jennifer L. Smith for Appellee Ricky Bell. Certificate of service date 8/19/03. [00-5516] (yh)

8/28/03 Appellant RESPONSE in opposition to the motion to reconsider appointment order previously filed by Jennifer L. Smith. Response from Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date 8/27/03. [00-5516] (yh)

9/19/03 CERTIFIED RECORD filed with certificate of appealability denied. Volumes include 30 Tr

(Vol. 3-30 are state court record); 3 Ex (Vol. 1 = 3 video tapes); 5 Pl. [00-5516] (laj)

12/2/03 Appellant MOTION filed to further stay mandate. Motion filed by Dana C. Hansen for Appellant Gregory Thompson. Certificate of service date 12/1/03 [00-5516] (yh)

12/8/03 U.S. Supreme Court letter filed denying petition for writ of certiorari [2799099-1] filed by Gregory Thompson [00-5516] Supreme Court No. 03-5759. Filed in the Supreme Court on 12-01-03. (swh)

12/12/03 ORDER filed granting motion to continue stay of mandate [2860508-1] filed by Dana C. Hansen [00-5516]. Richard F. Suhrheinrich, Karen N. Moore, Eric L. Clay, Circuit Judges. (yh)

1/23/04 U.S. Supreme Court letter filed: petition for rehearing denied [2889074-1]. Filed in the Supreme Court on 01-20-03. Supreme Court No. 03-5759 (swh)

6/23/04 OPINION filed: The judgment of the district court is VACATED and the case is REMANDED for further proceedings not inconsistent with the opinion of this Court. It is FURTHER ORDERED that the execution of petitioner Gregory Thompson is STAYED for 180 days in order to permit the district court to proceed. Richard F. Suhrheinrich, Circuit Judge, Karen N. Moore, Authoring Judge, Eric L. Clay, Circuit Judge. Suhrheinrich, J. concurring part, dissenting in part. (yh)

6/23/04 JUDGMENT FILED: VACATED and remanded. (yh)

* * *

7/1/04 Appellee MOTION filed to stay mandate pending the filing of a petition for writ of certiorari. Motion filed by Angele M. Gregory for Appellee Ricky Bell. Certificate of service date 6/30/04. [00-5516] (yh)

7/21/04 ORDER filed granting motion to stay mandate for 90 days pending filing for cert at the Supreme Court. The Stay of Execution remains. Richard F. Suhrheinrich, Karen N. Moore, Eric L. Clay, Circuit Judges. (yh)

9/22/04 Appellee MOTION filed to further stay mandate. Motion filed by Jennifer L. Smith for Appellee Ricky Bell. Certificate of service date 9/21/04. [00-5516] (yh)

* * *

9/28/04 ORDER filed granting motion to further stay mandate [3027804-1] filed by Jennifer L. Smith [00-5516]. Richard F. Suhrheinrich, Karen N. Moore, Eric L. Clay, Circuit Judges. (yh)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

GREGORY THOMPSON, Petitioner,	)	
v.	)	Case No. 4:98-cv-00006
RICKY BELL, Warden, Respondent.	)	Judge Edgar

The following Psychological Report was attached as Exhibit A to the Motion Under Fed. R. Civ. Pro. Rule 60(b) (Docket Entry No. 133), filed in the above court.

UNIVERSITY PSYCHOLOGICAL ASSOCIATES, P.A.
8430 University Executive Park, Suite 690
Charlotte, North Carolina 28262
(704) 547-1483/Fax (704) 547-0052

[Names Omitted In Printing]

PSYCHOLOGICAL REPORT
CLIENT: GREGORY THOMPSON
DATE OF BIRTH: 12-13-61
DATE OF REPORT: 7-22-99

Location of Examination:
Riverbend Maximum Security Institution (RMSI)
Nashville, Tennessee
Education of Client: 13 years
Occupation of Client: Death Row Inmate

REFERRAL QUESTIONS:

Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

1. Mr. Thompson's current psychological status
2. Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.
3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be [sic] considered to be mitigating in nature at the time of his trial.

PROCEDURE:

Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr. Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was made to replicate this type of assessment.

Following the 8-20-98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

It was intended that additional clinical observations of Mr. Thompson would continue to be made as part of this evaluation process. A return visit to RMSI was scheduled to occur in early 1999. By January 1999 Mr. Thompson's psychological condition had deteriorated to such a severe extent that observations relevant to the original referral questions became impossible. Mr. Thompson's lawyers now had questions concerning Mr. Thompson's competence to participate in *Habeas Corpus* proceedings. Two further interviews were conducted with Mr. Thompson for this limited purpose, on 2-2-99 and 4-7-99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

As a consequence of this interruption in the evaluation procedure, the psychological evaluation which was initiated for the purposes described in the **REFERRAL QUESTIONS** section of this report is, as yet, incomplete. Further interviews with Mr. Thompson will be conducted at a late [sic] time. Nevertheless, the extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson's mental state at and around the time of the 1985 offense.

CLINICAL OBSERVATIONS:

Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

FORMAL PSYCHOLOGICAL TESTING:

The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) was administered to Mr. Thompson on 8-20-98. It had been determined in other examination

settings that Mr. Thompson's level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

The MMPI-2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid features. There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA CONTAINED IN RECORDS:

The [sic] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of hi [sic] his incarceration in 1985. He has been treated almost continuously

with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

INTERVIEWS WITH COLLATERAL WITNESSES:

Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

Ms. Maybelle Lamar

Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she "took to my bed" for approximately five or six

weeks following the accident. Ms. Lamar was unable to attend to these children in any way at that time. She did not recall how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

Ms. Lamar described Mr. Thompson as displaying significantly "different" behavior when he returned to visit her following his discharge from the U.S. Navy. "Greg didn't act the same". Unlike the 'eager to please', passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was "angry", "sometimes sad". "I don't think he wanted me to know what was going on with him. He mostly just stayed away from me." Ms. Lamar reported that she noticed Mr. Thompson sometimes "staring off into space" or "talking to himself". She would ask him about these behaviors. "He'd deny it. He acted like he didn't know what I was talking about." Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson's trial.

Ms. Nora Jean Hall Wharton

Nora Jean Wharton is Mr. Thompson's older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She

described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates. Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg "You have the Devil in you." Mr. Thompson would tell his sister that he was attempting

to "knock the Devil out" of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a lenthy [sic] period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and antidepressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

CUSTODY OFFICERS AT RMSI

Following the second interview conducted with Mr. Thompson on 2-2-99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both

reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

MICHAEL CHAVIS

Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2, 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together for approximately four years, from 1980 to 1984.

Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions proved [sic] by Ms. Nora Wharton, Ms. Cajulao reported several episodes of "paranoid" and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were "after" him. He would close all the curtains in the house because he did not want the person who was "looking" for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson's mental state.

SUMMARY AND CONCLUSIONS:

Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious

behavior is reported as early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

/s/ Faye E. Sultan
Faye E. Sultan, Ph.D.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

GREGORY THOMPSON, Petitioner, v. RICKY BELL, WARDEN Respondent.	:	Case No. 4:98-CV-6

DEPOSITION OF FAYE E. SULTAN, PH. D.
(Taken by the Respondent)
Charlotte, North Carolina
July 22, 1999

Reported by: Dayna H. Lowe
Court Reporter
Notary Public

[2] **APPEARANCES**

For the Petitioner:

STEPHEN M. KISSINGER, Esq.
Assistant Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
530 S. Gay Street, Suite 900
Knoxville, Tennessee 37902
(423) 637-7979

For the Respondent:

GLENN R. PRUDEN, Esq.
Assistant Attorney General
State of Tennessee
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
2nd Floor, Cordell Hull Building
Nashville, TN 37243-0493
(615) 741-3487

Also Present:

Michael Chavis
Investigator
Federal Defender Services of Eastern Tennessee, Inc.

Witness Address:

Faye E. Sultan, Ph.D.
University Psychological Associates, P.A.
8430 University Executive Park Drive, Suite 690
Charlotte, North Carolina 28262

Deposition of **FAY E. SULTAN, PH.D.**, taken by the Respondent, at the Mecklenburg County District Attorney's Office, 700 East Trade Street, Charlotte, North Carolina, on the 22nd day of July, 1999, at 1:01 p.m., before Dayna H. Lowe, Court Reporter and Notary Public.

[3] **CONTENTS**

The Witness	**Faye E. Sultan, Ph.D.**	**Examination**
By Mr. Pruden		3

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* * *

PROCEEDINGS

Whereupon,

FAYE E. SULTAN, PH.D.,

having been duly sworn,

was examined and testified as follows:

EXAMINATION BY COUNSEL FOR RESPONDENT

BY MR. PRUDEN:

Q. Would you please state your name for the record.

A. Faye Ellen Sultan.

Q. And what is your profession?

A. I am a clinical psychologist.

Q. Dr. Sultan, where is your practice located?

A. My practice is located right here in Charlotte, [4] North Carolina.

Q. And are you a sole practitioner in your practice, or are you in partnership of some sort with others?

A. In the last several years, we actually have operated in partnership. I retain the directorship of the practice. It's called University Psychological Associates. I was, for many years, the sole proprietor of that practice. I'm

now a shareholder. And there are a total of nine psychologists and social workers practicing together.

Q. Are there any psychiatrists as part of your practice?

A. No, not at this time. There are not.

Q. You're appearing today pursuant to a subpoena that we served on you?

A. Yes, I am.

MR. PRUDEN: I'd like to make the subpoena Exhibit 1, please.

(Exhibit No. 1 was marked for identification.)

BY MR. PRUDEN:

Q. Do you happen to have a CV?

A. I do. It's part of the package that you've just been given.

Q. Oh, okay. Great. This will simplify things. [5] Dr. Sultan, just to make sure that I've got it straight, is this a copy of your curriculum vitae?

A. It is.

MR. PRUDEN: I would like to make that Exhibit 2 to this deposition, and, with your permission, after you mark it, I'd like to just keep it over here by me for reference.

MR. KISSINGER: No objection.

(Exhibit No. 2 was marked for identification.)

MR. PRUDEN: Off the record for a moment.

(Off-the-record discussion.)

BY MR. PRUDEN:

Q. Now I assume it will tell me somewhere on your CV where you are licensed?

A. I'm licensed in North Carolina.

Q. And only North Carolina, correct?

A. That's correct.

Q. I notice the date on your CV is 19 October 1996.

A. Yes, it is.

Q. Is it correct in all aspects, or are there any additions or deletions that need to be made to it?

A. There are no deletions I don't believe. There are some additions.

Q. Okay.

[6] A. Let me just be sure there are no deletions. No, I think everything stands as is.

In addition, in the last several years there are some presentations. That would be the nature of the additions. I gave a workshop track at the National Conference for Women and Addictions that was held in North Carolina, a national symposium addressing women's and addictions issues and the legal factors that ought to be considered. I did that track. I gave a lecture to the North Carolina Counselors' Association meeting about a year ago.

Q. And the nature of that?

A. That had to do with the appropriate assessment of trauma survivors, I believe, from a counseling perspective, or how a counselor might best interview people in a way that was ethical and effective. And I think those are the two additions.

Q. Okay. Thank you.

A. Sure.

Q. Now in preparation for – let me strike that. When were you first contacted to possibly work on Mr. Thompson's federal habeas case?

A. I think it was near the end of July of 1998. Perhaps August.

Q. So either July or August of last year?

[7] A. Either the end of July or the beginning of August of 1998.

Q. And who first contacted you?

A. Mr. Chavis did on behalf of Mr. Kissinger for the Federal Defender Services office.

Q. And what was the nature of that first contact? Was it simply to determine your availability to possibly assist in the case?

A. Mr. Chavis asked me about my availability and asked if I would be willing to perform a psychological evaluation to assess what Mr. Thompson's psychological condition might have been like at the time of the offense in 1985, to assess whether it was possible to make such an appraisal, to see whether there were factors in his personal background that might have been investigated at

the time of trial that would have had bearing on his psychological status at the time of the offense, and Mr. Chavis also suggested that they wanted to know something about Mr. Thompson's current psychological state, his level of functioning at the present time.

Q. Were you also asked if you would be able to determine his competency at the time of his criminal trial in 1985?

A. That was not an initial question, no.

Q. Was it a subsequent question?

[8] A. It became a question because Mr. Thompson's psychological state deteriorated very, very quickly at a point a few months after my initial meeting with him. At that point, there was a question about whether he would be able to proceed with the psychological evaluation, and I was asked to come and observe him and make some kind of determination about whether he was competent to proceed.

Q. In these habeas proceedings, correct?

A. That's correct.

Q. Did Mr. Chavis express to you any opinion as to what he thought Mr. Thompson's psychological condition was, his mental status was, at the time of the offense?

A. The only opinion that he expressed to me was that he thought that he was not in good shape, that he had deteriorated. He didn't label it in any particular way. Said he didn't think that he was doing as well.

Q. When you say he didn't label it, does that mean he didn't use any diagnostic categories, say out of the DSM-IV?

A. Exactly.

Q. Now after your initial contact with Mr. Chavis, did you accept being retained by them on this case, or did you have subsequent discussions in that regard?

A. I think the next conversation was simply a logistical conversation planning my first trip.

[9] Q. And after the initial series of factors or items that Mr. Chavis detailed for you that they wanted you to assess, was that amended any?

A. I need to ask you to tell me what you mean.

Q. Sure. You said that you were asked to determine Mr. Thompson's mental status at or about the time of the offense, if it was possible to make that appraisal, and then his current competency. Have you been asked subsequent to that to render any other expert opinions in this matter?

A. Only what I said to you just a minute ago in terms of his competence to proceed with the appellate process. I don't think I've yet been asked to assess his competence at the time of the offense. I don't think that's ever been a question.

Q. Do you know how you came to be recommended to the federal public defender in Knoxville to participate in this case?

A. I don't.

Q. Have you ever worked for Mr. Kissinger before?

A. I don't think so. I don't know all of the attorney pairings in the state of Florida for the capital collateral representative. I know that Mr. Kissinger, although I didn't know him then, worked there at some point, and it's possible that he was attached to one of [10] the cases that I worked on.

Q. How about Ms. Dana Hansen? Have you ever been employed by her?

A. I don't think so.

Q. You said that you have a clinical practice, correct?

A. That's correct.

Q. And you also do forensic work, obviously, since you're here today?

A. Yes.

Q. How much of your practice percentage-wise is forensic work? Can you give me an estimate?

A. At this point in my practice, maybe 20 or 25 percent.

Q. And the balance, 75 to 80 percent, being clinical, is that correct?

A. Yes.

Q. Of your forensic work, can you give me a breakdown, percentage-wise, civil cases versus criminal cases? And when I say "civil," I mean, you know, family law matters, personal injury matters, things of that nature.

A. I think that, along that dichotomy, probably half and half criminal versus civil cases as you've described them. I think that's probably about right.

[11] Q. Now out of the criminal cases, what percentage of the time have you testified for the defense versus the State?

A. A lot of the time when I do an evaluation, either for the State or for the defense, I don't wind up testifying, so it's a little hard to describe it quite that way.

Q. Explain to me basically how that works out for you.

A. Okay. I may be called upon either to supervise an evaluation that goes on in my office by another psychologist on our forensic team. I may be called upon to do an evaluation in a criminal situation. Sometimes what I discover in the evaluation is helpful to the attorney who's asked me to do the evaluation. Often I only know that by whether I'm called to testify later in the case, assuming that there is a trial and there is testimony. Some percentage of cases will come to a settlement arrangement or a plea arrangement. Some percentage of cases, because I'm in a supervisory capacity, I won't wind up testifying at all.

Q. Approximately how many capital cases have you been consulted on in the course of your practice?

A. In the course of my practice. Maybe 75, maybe 80.

[12] Q. And capital cases out of which states?

A. North Carolina, Utah, South Carolina, Florida, Virginia. And I guess this counts as a capital case, even though it's a post-conviction case, right?

Q. That's correct.

A. So Tennessee.

Q. I meant to include collateral cases, either post-conviction or federal habeas among those capital, so does that bring in any other states besides the five that you listed?

A. I don't think so. I think that's all.

Q. Out of the 75 to 80 capital cases where you have been consulted, how many of those, roughly, have you given testimony in court?

A. In total I'm going to say maybe 25 or 30.

Q. And would the testimony that you gave in capital cases be in those five states that you've listed for me, North Carolina, Florida, Utah, South Carolina, and Virginia?

A. I don't think that I've testified in Utah. And I was called to testify in Virginia and then declined to testify, so that I may or may not have a record of appearing as a witness in that state. I'm not sure.

Q. In all the capital cases where you've been consulted, has it been for the State or for the defense?

[13] A. They've all been for the defense.

Q. All for the defense. And so none of them would be like a court-appointed expert? You were perhaps paid through court funds but working for the defense in all those cases? I mean, you weren't like an amicus to the court in any of these?

A. No. In fact, North Carolina doesn't often operate on that kind of system, but most of the payment has come through court funds as you described just a minute ago.

Q. Because most of the defendants were indigent?

A. Yes. That's correct.

Q. Obviously, in the states where you've testified you have been declared an expert, correct?

A. Yes.

Q. What federal jurisdictions have you been declared an expert in?

A. I don't know if I know.

Q. As best you can recall.

A. I think the only federal case that I testified in that fits into the category we're talking about is a North Carolina case, a Charlotte case.

Q. Would that be in the Western District of North Carolina?

A. Sounds right to me.

[14] Q. All right. Now a Dr. Barry Crown has also been retained to work on behalf of Mr. Thompson in this case. Are you familiar with Dr. Crown?

A. I am.

Q. How is it you know of Dr. Crown?

A. I've never met Dr. Crown. I hear that he and I have appeared in the same hallway, although we're excluded from speaking to one another or even knowing

one another. I'm not sure what he looks like. But I think there have been several cases, some that I know about and some that I don't, on which he's also been called in to prepare an opinion of some kind.

Q. So you've never directly consulted with Dr. Crown on a capital case?

A. That's not true. We have had probably a total of four, maybe five, telephone conversations where we've talked briefly about some of those cases. I just don't know what other cases there are.

Q. Have you had conversations with Dr. Crown about this case?

A. Yes, I have.

Q. And the nature of those conversations?

A. Because I was doing only a part of the psychological testing, having been told by Mr. Chavis that the neuropsychological and intellectual assessment [15] would be done by Dr. Crown, I needed to check with Dr. Crown about his test results so that I could include them as part of my opinion, part of my work. In that kind of situation, I have the permission of the attorney to make that kind of consultative phone call, and so we did talk about Mr. Thompson.

Q. Did you provide information to Dr. Crown about your testing and evaluation of Mr. Thompson as well?

A. I did not.

Q. Anything about any diagnoses you may have reached?

A. No. I don't think I provided him with any diagnostic information at all.

Q. Do you know Dr. Theodore Blau?

A. No, I don't.

Q. Do you know of him?

A. Yes.

Q. Obviously, you are a psychologist, you're not a medical doctor, correct?

A. That's correct.

Q. Do you have a law degree, a juris doctor or something else like that?

A. No, I don't.

Q. You're not authorized to prescribe medications, correct?

[16] A. No. In North Carolina, psychologists don't prescribe medications. In some states they do.

Q. As part of your training, have you had any training regarding psychotropic medications and their effects?

A. Yes.

Q. What sort of training is that?

A. I have had both graduate school training about the effects of medications and the various types of medications and postgraduate seminar education about that matter.

Q. Various workshops that you've attended, for example?

A. Yes.

Q. You're not a neurologist, correct?

A. No, I'm not.

Q. What sort of neurological training have you had?

A. Almost none. That's why always in an assessment where a neuropsychological question comes in I will request the assistance of a neuropsychologist.

Q. In performing the evaluations that have been requested of you on Mr. Thompson's behalf, you've reviewed various documents?

A. Yes.

[17] Q. You have provided me with a three-page, approximately three-page document, two and a half pages, of – says documents reviewed as of 7/22/99?

A. That's correct.

Q. As you sit here today, to the best of your knowledge, this is a complete listing of all the documents that you have reviewed?

A. To the best of my knowledge, every single document that I have reviewed is listed on these three pages.

MR. PRUDEN: If I could, I'd like to make that the next exhibit to the deposition.

MR. KISSINGER: No objection.

(Exhibit No. 3 was marked for identification.)

BY MR. PRUDEN:

Q. Are there any other materials, outside of documents, that you've reviewed as part of your process of evaluating Mr. Thompson, for example, audio tapes, videotapes?

A. No. There are no tapes of any kind relating to this case that I have reviewed. The other material would be my own assessment notes from my clinical interviews with Mr. Thompson, notes that I made during my interviews with collateral witnesses, the psychological testing data that I collected.

[18] Q. Any other materials –

A. I think that's it.

Q. – that have not been listed as documents? Okay. The clinical notes and notes from your interviews with collateral witnesses and the psychological test data, those are items on the subpoena. Have you already forwarded those materials to Dr. Blau?

MR. KISSINGER: I don't think they have been forwarded as of this very moment, but they will be sent off immediately following the deposition.

MR. PRUDEN: And you'll provide us with an inventory of what's being sent?

MR. KISSINGER: Absolutely.

MR. PRUDEN: Do you have Dr. Blau's address?

MR. KISSINGER: I have it.

(Off-the-record discussion.)

BY MR. PRUDEN:

Q. How many times have you actually seen Mr. Thompson?

A. I've seen him three times.

Q. Can you please tell me when those three times were?

A. I can. The first time I met with him was on August 20th of 1998, and I spent about four hours with him at that time. I then saw him on the 2nd of February, [19] 1999, and spent about two and a half or three hours with him, perhaps almost four hours with him. And again on the 7th of April of 1999 for about an hour, hour and a half.

Q. Let's take these in order. What exactly was the purpose of your visit with Mr. Thompson on the 20th of August, 1998?

A. The purpose of my initial visit was to address the four questions that I mentioned at first, to assess Mr. Thompson's current psychological status, to assess Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense, and to assess social, environmental, psychological, and economic factors in his life that might have been considered to be mitigating in nature at the time of his trial in 1985.

Q. And how did you go about this on the 20th of August, 1998?

A. Prior to that date, I had received some records from the Federal Defender's office, and I reviewed those records to establish that Mr. Thompson had a reading level that was adequate to allow the administration of

certain psychological tests. My procedure is, prior, to the initial interview, to do very limited record review so that I go into the first interview with an objective [20] mind. So basically what I knew about him at that point was the crime which he had been convicted of, the date of the offense, and what his educational background and reading level were. I also knew that psychological testing had been administered to him in a variety of settings prior to my going in. At that point, I went in with just the Minnesota Multiphasic Personality Inventory for that first date.

Q. Is that the MMPI-2?

A. Exactly. And I spent two and a half of the four hours with him conducting the clinical interview, and about 90 minutes of that time was spent for Mr. Thompson to self-administer the MMPI following my instructions and direction.

Q. That's in addition to the two-and-a-half-hour interview?

A. That's correct.

Q. And that time again was?

A. About four hours.

Q. I'm sorry. No. For the MMPI.

A. About 90 minutes, about an hour and a half.

Q. What did you assess Mr. Thompson's reading level at prior to going in?

A. I didn't assess his reading level. It had been assessed as above eighth grade, which is the required [21] reading level for the proper administration of the MMPI-2.

Q. And the notes of the clinical interview on that date are among the materials you'll be forwarding to Dr. Blau, correct?

A. Yes. That's correct.

Q. As well as the raw data of the MMPI?

A. Yes.

Q. Will that raw data indicate what scoring programs you've used on the MMPI?

A. Yes.

Q. Were you able to validly administer an MMPI to Mr. Thompson –

A. Yes, I was.

Q. – at that time?

A. At that time.

Q. And there were no other standard tests used by people in your profession that you administered on that date?

A. No. Most of the testing had already been completed by Dr. Crown by the time I saw Mr. Thompson for the first time, although I was not aware of any of the results of that testing.

Q. Did you discuss with Mr. Thompson the facts and circumstances of the crime for which he stands convicted [22] and sentenced to death during your interview of him?

A. Yes.

Q. How did you discuss them with him? Did you ask him questions or detailed questions, Dr. Sultan, or did you just ask him an open-ended question?

A. I would have had to ask him some open-ended questions, because I didn't know the details, so – I hadn't read any factual basis of the crime. That meeting was my first look at Mr. Thompson and my wanting to see how he presented himself without a lot of particular provocation from me, so that, because I was to have a lengthy time to interview him – although it turned out not to be the case, at the time I thought I was going to – that interview, I think, would be described as quite open-ended, basically me asking him to tell me about himself, about what aspects of his growing-up years he wanted to talk about.

I asked follow-up questions when he would bring a topic up. He answered a general question about the offense, and then I would ask some follow-up questions about that as well.

Q. Do you have your notes of that interview here with you to refer to?

A. I don't. They're packaged up for Dr. Blau.

Q. Did you write down every fact that Mr. Thompson [23] told you about his recollection of the murder of Ms. Lane on your notes?

A. I don't recall specifically, but my best guess would be that, while there's some factual material about the offense itself, my notes are much more likely to reflect his psychological state at the time and what he recalled about how he felt and what he was experiencing and what the other people around him seemed to be experiencing through his observation. So I'm sure there's

factual information, but I hesitate to tell you that every single detail that he suggested to me wound up in those notes.

Q. What did Mr. Thompson tell you about the offense, as best you can recall?

A. As best I recall, Mr. Thompson talked about his relationship with the young girl that he was with for the days and weeks prior to this.

Q. Joanne McNamara?

A. Yes. And how he felt a tremendous need to protect her. He fancied himself rather as a rescuer of young women, and this part of the story came about in his description of other circumstances in which he had provided assistance to damsels in distress. Joanne McNamara was the last in a line of young girls that Mr. Thompson viewed himself as taking under his wing. He [24] was quite disturbed about her circumstances.

What he told me was that they were thrown out of the place that they had been staying when, it was discovered that they were not in fact married. I don't know who it was who portrayed them as a married couple to the people that they were staying with, but that the truth of it was discovered, that someone contacted Joanne McNamara's mother – or parents, I don't know which; I think mother – to let her know that this child was in her home, the person they were staying with, that Mr. Thompson forced the victim in this case into her car at knifepoint.

Mr. Thompson was not sure whether he precisely recalled that he killed Ms. Lane – is that correct?

Q. That's correct.

A. Okay. But that he knew that he had in fact killed her.

Q. I'm sorry. Would you say that again for me?

A. I'll do my very best. He was not sure – and I asked him this specifically – whether he was recalling the events from his own memory or from having heard the recitation of the facts and a reminder of his own statement to the police over the years. At this point in time, we're about 14½ years after the event.

He wasn't claiming in any way not to remember, [25] simply was unable to make distinctions for me about which memories were specifically his and which he had read and heard about in the course of his case and had heard discussed about him. And, of course, there had been post-conviction hearings and, by then, Supreme Court decisions, and so the facts had been recited many, many times. I was not clear precisely how clear his recollection was at the end of that first interview. That was one of my issues to revisit at a later time.

Q. Does he have any recollection of actually stabbing Ms. Lane?

A. He said he wasn't sure. That was really the issue that we talked about. He said that he knew he had talked about it at some point, and he had been told he talked about it at some point, but that his emotional state at the time was pretty disrupted and aroused. At some point during that conversation Mr. Thompson began to show a lot of agitation and anxiety, kept expressing a willingness to talk, but it was clear that in remembering there was a lot of pain for him, and he expressed a great deal of remorse to me about the occurrence of the offense. Said that

he had no real understanding even after all this time about how he could have been capable of such a thing. It was not characteristic of him, according to him, for him to be assaultive in that way. [26] Said that he had never killed anyone before and that he didn't have any reason to hurt Ms. Lane. Said that it haunted him.

Q. Now were there any visible signs you observed of this anxiety and disturbance?

A. Easier to demonstrate than to talk about verbally, so I'll do that and see if I can describe what I'm doing.

Q. Okay, and if you'll do it and maybe –

A. Narrate it at the same time.

Q. Okay.

A. Okay. When Mr. Thompson becomes agitated, he rocks back and forth in his chair, does what I've heard referred to as pill-rolling, finger rolling with both hands, rubbed his face a lot with his hands, used the same phrases over and over again, and then became what a psychologist or psychiatrist might refer to as tangential, would begin to talk about different subjects and then bring himself back to the subjects at hand, or I might direct him back to the subject at hand.

At some point he began to talk to me – and I don't know that it was connected specifically to talk about the offense, so I want to be careful to say that to you – but at some point during the interview he began to tell me that he had written all of the songs on the radio [27] that I ever listened to, and he began to tell not just me that, but any guard that wandered by in the hallway, tell himself that, told me that again and again. I disagreed with him at first

to see what would happen, and he was quite secure in that belief and wasn't agitated by the fact that I challenged him. He just thought I was silly. And I think that probably would be my interpretation of agitation. Because it was the first time I saw him, I don't know if the belief system that I was hearing about that seemed so odd was connected to agitation or simply a part of what he was like, and so I made some note about that but didn't attach any particular significance to it at that time.

Q. What was his reaction when you expressed disbelief about his writing the songs?

A. He told me I was silly and patted my hand.

Q. If I understood your comments correctly, he would start out basically on point as he was talking to you about various aspects of the crime or the issues that you were talking about, and then he would become tangential, correct? Or did he start out tangential at some points and then focus back in on what he was talking about?

A. Focusing I think is an overstatement in my event. I don't think that he ever was really focused.

[28] Q. Why?

A. Having only seen him that one time in a relatively coherent state, I don't know what he's like when his medication is properly regulated and he's at his best, but Mr. Thompson in general rambled. His general style of verbiage was what we would call a little loose in association. Something would remind him of something else, and he would begin talking about that before he finished talking about what he started out talking about. Was tangential in the sense that whatever associations he made in his mind that most of us would keep to ourselves

we all do them, we just don't all say them – he would then say whatever it was that occurred to him. I didn't do any particular kind of redirecting to see how focused he could become. I simply redirected as I needed to to get a general sense of the way his thought process was working.

Q. Would you describe Mr. Thompson as being self-reflective during your initial interview with him?

A. No.

Q. The reason I asked that was you did state that he was talking about how he felt about the crime.

A. The word "reflective" means to me a more intellectual process.

Q. All right.

[29] A. He emoted a great deal. He reflected very little. Insight, which is an intellectual kind of exercise really, almost an academic, removed exercise, is not something Mr. Thompson has very much of I don't think. He reacts very strongly emotionally, and sometimes out of control emotionally, but I don't think I'd categorize that as reflective. He was deeply hurt and deeply upset by his own behavior, became tearful, rocked a great deal back and forth in his chair, did the hand gestures that I talked about, but did he reflect upon it and describe it to me objectively? I don't think so.

Q. Was it Mr. Thompson's becoming tearful that led you to conclude that there was remorse and that alone?

A. No. I think the content of his verbalizations was pretty clear as well. I don't know what's wrong with me; how could I have done that; how could I be a beast; why

was I a beast; what was I thinking; how could this happen; should never have happened; I t ink about her all the time; she deserved to have a life. With or without the emotion attached, the content I think is pretty clear.

Q. Was this in response to any specific question by you as to why he did this crime, or was this just part of his gene-al rambling to you or discussion?

[30] A. I don't think I would have asked Mr. Thompson why he committed the offense during my first meeting with him. I think he pretty much just chose the way he wanted to talk about it.

Q. You said that he described Joanne McNamara as the last in a long line of young women or damsels in distress that he was rescuing?

A. Actually, I think I described it that way.

Q. All right.

A. I don't think that's a label he would have used. Again, that indicates a whole lot of self-reflection. He simply told me about other girls that he had helped.

Q. Were you able to verify that there were other young women he was able to help besides Ms. McNamara?

A. I don't know if I'm able to do that. I haven't done that.

Q. Have you asked Mr. Kissinger or Mr. Chavis to try and verify that for you?

A. No, but it's a very interesting idea.

Q. Did you ask him how he felt he was helping these young women?

A. Yes, I did.

Q. What was his response?

A. He protected them.

[31] Q. From?

A. Enemies.

Q. Was he more specific?

A. Different situations, different enemies. Joanne McNamara's case, her mother was the enemy. Evil men in her mother's home were the enemy. Her mother wanting her to prostitute. In a situation that he was describing to me in Hawaii – no, maybe it was a situation that took place before he was transferred to Hawaii. In the service, he rescued two teenage runaway girls, put them up in his barracks. They came from, according to him, abusive, violent homes, the enemy being their family – their families.

Q. Did he ever tell you that instead of rescuing young women that he assisted young men?

A. Never. I don't think so, no.

Q. Did you talk with him at all about his girlfriend Arlene during this first visit?

A. A little bit, yes.

Q. Did you bring up the topic or did he?

A. I don't remember.

Q. What do you recall was said about her and his relationship with her?

A. That he loved her very much, that he knew her for a long period of time, that they lived together when [32] he was in Hawaii, that he wasn't good enough for her.

Q. Did he say why he was not good enough for her?

A. I don't recall that he did specifically, no.

Q. And you didn't ask him?

A. I don't think so.

Q. You administered the MMPI-2 to Mr. Thompson. He willingly took the test?

A. He did.

Q. As you observed him, did he have any difficulty reading the test and taking it on his own?

A. He didn't have any difficulty reading it. He required a fair amount of supervision to take it.

Q. Can you elaborate on that for me, please, the supervision that was required?

A. I'll describe the level of supervision as unusual statistically, in terms of the number of MMPIs that I've helped to administer over the years.

Mr. Thompson read some of the items aloud to me and then made rhyming sounds to some of the words. Some of the items struck him as particularly amusing, and he would laugh out loud, and I would laugh with him and suggest to him that he get back to what he was doing. It didn't wind up taking him – part of how I suspected he might be of normal intelligence is that it didn't take him much longer than the average person who does it without the [33] distractions. He asked a few questions about the

interpretations but took my direction when I suggested to him that he was the one who needed to make the interpretation.

Q. So by and large Mr. Thompson had no apparent difficulty comprehending the questions or interpreting them?

A. I don't believe so, and the scoring of the test doesn't reflect any difficulty with comprehension.

Q. So you never reached a point where you had to read questions to him because he was unable to read them and understand them?

A. No.

Q. Is there anything else that occurred during this first visit, this four-hour visit with Mr. Thompson, that we haven't discussed?

A. I think we have hit the high points.

Q. Did you talk with anyone else at the prison concerning Mr. Thompson during that first visit when you were out there at River Bend, or was your time at River Bend solely limited to dealing with Mr. Thompson?

A. During that first time, my time was limited solely to him.

Q. On the 2nd of February this year, you said that you spent between two and a half and three hours out at [34] the prison?

A. I did.

Q. And what happened during your visit? What did you do during your visit to the prison on 2 February, '99?

A. I think the answer to the question of what I did is that I observed Mr. Thompson. I observed Mr. Thompson in interaction with me, and I observed Mr. Thompson in interaction with prison officials, and I observed Mr. Thompson in interaction primarily with Mr. Chavis.

Q. Where did you make these observations?

A. We were in one room the entire time.

Mr. Chavis entered that room with me. It's a small room, kind of a cell-sized room. In fact, I think it is a cell.

Q. A visitor's room?

A. It's used as a visitor's room, but I don't – I don't think that it has the amenities of a typical visitor's room. There is a table in there, but I think it really is a cell that's set aside in the high-security area of that prison in which he could be observed from three sides, so part of what I got to observe was Mr. Thompson's reaction to the people who were observing him. It was a lot like being in a fish bowl.

[35] Q. And the reason you went out there on the 2nd of February was why?

A. It was about time for me to go back and continue my evaluation, but prior to me planning that trip specifically, using Mr. Chavis as my contact person for the logistics, Mr. Chavis asked me if I might come and observe him. He called me at some point a week or so before the time of my visit and said what I said to you earlier, which is that he was concerned about him and thought that he wasn't doing very well and asked if I would come and look at him.

Q. What did you observe about Mr. Thompson on this visit?

A. Mr. Thompson was in terrible psychological condition. I'll describe his physical appearance first. Mr. Thompson was physically filthy. His body stank, stank to the point where I could smell him before I could see him enter the room. He looked disheveled. He came into the room wearing a dirty rag wrapped around his head. He was highly agitated, quite angry during much of the visit, sometimes threateningly so.

Q. Toward you?

A. Not toward anyone in particular. He alternated between being absolutely silent and speaking in great gushes of words, streams of words. Mr. Thompson appeared [36] to be in a great deal of psychological discomfort. He was not having the sort of psychotic episode where someone is comfortable being crazy. He was apparently quite tortured.

Mr. Thompson spoke in what could be described clinically as word salad at times, where words were strung together that had nothing to do with one another. His answers to questions didn't appear, on the surface at least, to have anything to do with the questions.

Mr. Thompson didn't know who I was. Did not know that he was living in a prison unit, thought that he was living on a slave ship.

And there are psychologists and psychiatrists who believe in the symbolic level of speech of that nature, so I hesitate to say to you that he was not able to communicate anything. Perhaps it is that I was not able to understand much of what he was trying to tell me.

But he told stories that had to do with his enslavement and with his suffocation and with the fact that he was being destroyed by an unknown tormenter, although he knew it, he just couldn't tell me who it was or what it was.

That alternated with talk about how he was the god of the world and the king of the world and that he had seen heaven and that he had the power to set himself [37] free and to get us all out of the slave ship that we were living in or that we were on.

At some points he was able to say who I was in terms of knowing that I was a psychologist. At other points he told me that I was one of his vessels, one of his servants. At some point he became quite angry. Sometimes he would get very, very angry, and I was unable to detect anything external that had caused whatever the verbal eruption was.

He was kept in hand shackles as well as leg shackles during that visit and sometimes appeared very uncomfortable in them and other times seemed to be unaware that he was in them. He tried to leave the interview room – stated some intention to leave the interview room maybe a dozen times and was distracted by myself or Mr. Chavis into continuing conversation.

After about an hour and a half, he allowed Mr. Chavis to leave the room. At first he was afraid of me. He told me that I was evil and that I was there to kill him. At some point it was all right for Mr. Chavis to leave, and, in fact, it became very important for Mr. Chavis to leave. So he dismissed Mr. Chavis, and Mr. Chavis left.

Q. You say it became important. Important to him, or did he say it was important or did you judge it to be [38] important?

A. He said. He directed it in some way. I'm not sure exactly what he said. Mr. Chavis asked permission to leave at some point and was told no. At that point it was okay for him to leave. Mr. Thompson seemed to be reacting very, very, very strongly to even casual observation on the part of the guards. Because of his high level of agitation, and later as I became aware, because the guards were very concerned about him and the state he was in, there were more than the usual number of people around I think, and Mr. Thompson was aware that he was being observed more closely and yelled things at the guards and pounded his hands sometimes on the table and got up from his chair and moved his body around.

At some point he was willing to remove the rag he was wearing on his head, but I think that took almost two hours. And our interview terminated when Mr. Thompson decided that I could save him if I would allow him to kiss my hand, and when I refused, he became very angry, stood up, turned his back on me, and told me to leave. Didn't use the word "leave" but said you're not here anymore.

When the guards, four guards, came in to assist Mr. Thompson in returning to his cell, whether intentionally or not, they wound up placing me between [39] them and Mr. Thompson. Mr. Thompson was extremely angry with the guards. I don't know why. They didn't know why. They were trying to talk with him about it. Didn't want to go back into his cell block the way they wanted him to, said that that was the incorrect door. Kept insisting that he

come out the door that the guards were standing in front of, the door that I was supposed to leave by.

I actually requested that the guards move me from between them, because I was concerned that there was going to be some sort of physical altercation at that point. They were as well. I was – Mr. Thompson's a lot taller than I am. With the thrashing around that he was doing – they weren't physically struggling at this point; he was thrashing around himself – I was afraid that he was going to actually hit me with his head. He was rocking his head back and forth.

Q. Gesticulating too?

A. To the extent that he could –

Q. That he could with the shackles?

A. – with his hands shackled. In fact, I think they were on a waist band too, because I remember noticing his head moving much more than his hands. If he'd been waiving [sic] his hands in my face, I would have noticed.

[40] The guard then spent about ten minutes, maybe a little bit less, with me, then, in the hallway and Mr. Thompson in that same room I was telling you about with all four guards around him with them talking very quietly and patiently to him. There was one man in particular that he seemed to be comforted by, and this man spoke very quietly to him in his ear about that it would be okay and he could go back to his cell now and he wouldn't let anything bad happen to him and although Mr. Thompson continued to curse, the volume of his emotionality came down, and that guard led the procession of people out the back door of that room back towards the cell block.

At that point, after they had him back in his cell, they actually brought him back to me.

Mr. Thompson – I thought this was really quite dignified behavior on the part of the custody officers.

Mr. Thompson was apparently in a room in which he was not allowed to have paper or pencils or any object at all, but he had been telling me for those two and a half or three hours by that point that he had some documents that he needed me to take to his lawyer for him. Sometimes they were a secret code or a map to a gold mine. Sometimes those documents came up as his salvation. But the guards actually led him back to his cell to let him [41] look for those documents, and then they led him back into the room so that he could tell me from the doorway that they had been stolen.

Q. So he never delivered any of these documents to you?

A. There weren't any such documents.

Q. Okay,

A. And the guards assured me that there had not been any documents stolen, that in fact he was not able to have anything with him and hadn't for some time so that there wasn't anything missing from his cell.

Q. Were you able to carry on any sort of a conversation with Mr. Thompson during this visit?

A. I think that depends a lot on what you think a conversation is. We were not conversing as you and I are. Words were being exchanged back and forth, and at some point he thought that we were making contact, because he

appeared to be pleased when he was talking to me or when he was talking to Mr. Chavis. He didn't say anything that made any sense to me particularly.

Q. And after they took Mr. Thompson away, you didn't see him again on that date?

A. No, I didn't.

Q. Did you, subsequent to Mr. Thompson being taken away, talk with any of the guards?

[42] A. I did. Two in particular.

Q. Okay.

A. I don't know their names.

Q. What was the nature of those conversations? Before you answer that, Doctor, did you make any notes about those conversations with the guards?

A. I did, as soon as I left the prison as a matter of fact. And I in fact had to make notes about that interview after I left Mr. Thompson's presence, because part of what he did – and I neglected to tell you this earlier – is that he studied very carefully every single pen mark that I made on my paper, took the pad out of my hand, made his own notations on the pad, read words out loud, made up different words, told me to write down various words and spelled them for me.

Q. Are those notations that he made on your pad part of the documents that are being forwarded to Dr. Blau?

A. They are.

Q. What did you discuss with the correctional officers?

A. I was very alarmed by the condition that I saw Mr. Thompson in. When I had seen Mr. Thompson about five and a half months before that – no, I guess maybe not quite that long, about five months before that – he was [43] in a much, much better psychological state.

The level of anguish and disorientation and confusion and anxiety that he was living in was very alarming to me, and I asked the correctional officers who came back to talk to me how long he had looked like that, I asked them what they thought about what was happening to him. They indicated to me that they didn't understand why he had been allowed to get into that kind of psychological position. They thought of him as a mental health inmate. They thought he had longstanding psychological problems, according to their report. They talked to me about the fact that there was a unit either at that prison or somewhere nearby for severely mentally ill inmates, and they both expressed the belief that Mr. Thompson needed to be housed there.

One, at least, of them had known him for many years and said he had never been as bad – in his words, as bad as he had been in the last several weeks, and they indicated to me that some custody officers had been relaying information about his psychiatric condition to the contract people who were mental health service providers for the prison unit and that it didn't seem that much was being done.

Q. Are the names of those correctional officers with whom you spoke in your notes?

[44] A. They're not. I was upset enough and physically a bit intimidated by the interaction I just had with Mr. Thompson that I didn't look at their name tags. When I left, I immediately called Mr. Chavis and described what I could remember about their physical appearance and asked him to identify them.

Q. Was Mr. Chavis able to identify them?

A. I don't know.

Q. He's never gotten back to you on that point?

A. No, he has not.

Q. Did you make any attempt to talk to the prison mental health personnel after this episode with Mr. Thompson on the 2nd of February, on that particular date, before leaving the prison?

A. What I did was talk to Mr. Kissinger seeking permission of some kind from him about how to pursue communication of the kind you're describing. He suggested to me that he didn't think it was appropriate at that point for me to directly contact the prison personnel unless I thought Mr. Thompson's life was in danger – in which case I wouldn't have asked his permission, I just would have told him that's what I needed to do – and he said that he would communicate it in whatever way he saw appropriate.

Q. Had you planned to do any testing of [45] Mr. Thompson when you went out there on the 2nd of February?

A. No.

Q. I guess that brings us to April 7th.

A. Yes.

Q. What happened, then, on that date?

A. I was scheduled to appear at a hearing that I don't really understand the nature of exactly, so I can't tell you what it really is legally, but there was some kind of hearing in which the issue of his competence to proceed in his appeals was going to be discussed.

Q. That's okay. Mr. Kissinger and I know what the hearing was supposed to be, so you just tell me what it was that happened out there, and I think we'll be fine.

A. Okay. I showed up at whatever city it was in the night before the hearing, and I had asked to speak with Mr. Thompson, because present competence is such a fluid condition. Mr. Kissinger and I both met with Mr. Thompson together – he and I sat side-by-side with Mr. Thompson across the table – and I talked to Mr. Thompson, and I thought that probably within the legal definition of competence to proceed as Mr. Kissinger explained it to me, at the time that I met with him, he probably met that definition. He probably met that standard for competence.

[46] Q. What sort of things did you talk about with Mr. Thompson?

A. To describe it as talking about with is probably not an accurate characterization. Mr. Thompson was very angry with me. He did not want to talk with me.

Q. Was that how he expressed his anger, simply I don't want to talk with you, or were there other signs of anger directed toward you?

A. Very, very, very rapid clipped speech about how he didn't know why we had to meet, didn't want to meet, the sort of tone of voice I'm using right now. Very clipped, very rapid. He had met a good doctor; he had already talked to a good doctor; why was I there; could I leave him alone; he didn't want to talk about it again; he didn't want to tell me whether he knew where he was; he knew lawyers were representing him; he knew lawyers were trying to kill him; he knew he was in a jail; couldn't I see the bars; was I blind; you know, obviously there were bars.

Some of what he said wasn't coherent, but when I asked him pointed questions about his legal circumstances and about the function of the court, he answered those questions, not directly exactly, but let me know that he understood. He didn't seem to understand that the doctor that he liked so much had been sent there [47] by the State.

Q. Dr. Blau you mean?

A. Yes.

A. According to Mr. Thompson, the man who came to see him was going to save him and quite a wonderful fellow and looking out for his best interests and couldn't I just go away. Said they made contact. They had very good harmony. They had a good – I think connection is the word that he used. That it had been a significant meeting and that I ought to consult with the doctor if I wanted to learn something. He was quite a learned man and a good man, unlike the person I was.

At some point he knew who Mr. Chavis was, said some angry things about him. At some point he wasn't sure who Mr. Chavis was. But he knew that Mr. Kissinger was his

lawyer each time I asked him. And so he tolerated my presence for about 45 minutes, maybe an hour.

Q. Was he angry toward Mr. Kissinger?

A. I – my interpretation is that he was angry with Mr. Kissinger for bringing me into the room. He thought Mr. Kissinger was doing kind of a crappy job and told him that he wished he would just get some money so he could get a decent lawyer, but he said that Mr. Kissinger hadn't been horrible exactly so far, right [48] at that point, and although he would become free when Mr. Kissinger raised funds for his release, he knew that he was stuck with Mr. Kissinger for at least the next few days, which said to me he knew who Mr. Kissinger was. When I asked him if Mr. Kissinger was actually a fund raiser or whether he was a lawyer, he said he was a lawyer, so – but he wasn't really happy with anybody in the room.

He told me actually that he – I asked him when the last time was he had a bath because he looked like he had showered, and, in fact, whoever was the chief custody officer – I think it might have been a captain – Mr. Kissinger and I were in his office waiting for Mr. Thompson to be brought to whatever room we were going to be allowed to sit in, and he mentioned to us in passing that Mr. Thompson had eaten his dinner or had eaten something and had bathed.

When I asked Mr. Thompson when he bathed, he told me it had been months. When I asked him if he didn't remember taking a shower, he became very angry with me, so I didn't know whether he was angry because he didn't want to talk about taking a shower or because he didn't remember taking a shower.

Q. On 2 February did you ever ask him about his hygiene or lack thereof?

[49] A. Did I ask him? I must have, because he told me that he didn't like water. I told him he stank, so that doesn't qualify as asking, but I think we had those two exchanges at least.

Q. Were you able to elicit from him why he allowed his personal hygiene to deteriorate at that point in time?

A. Can't, can't, can't. Afraid, afraid, afraid.

Q. Of water, water, water?

A. Yes.

Q. Okay. Did you administer any tests to Mr. Thompson on 7 April '99?

A. No.

Q. Do you intend to administer any other tests to Mr. Thompson between now and the evidentiary hearing in September of this year?

A. I don't think so.

Q. You had to think for a moment about that.

A. Well, it would be very interesting and maybe clinically interesting. That's what I have to decide about, maybe if it would be clinically significant to do some projective psychological testing with him. The judgment that I'll make is whether it's likely to be so stressful for Mr. Thompson that the stress would outweigh whatever possible gains there might be.

[50] I'm also not at all sure that I'm going to be able to complete my evaluation by September, because if Mr. Thompson's condition is not improved beyond what I saw the last time I visited with him, I'm not sure how one might do that.

Q. And that last time would be 7 April, correct?

A. Yes.

Q. What tests, as we sit here today, do you think you would perhaps like to administer to further assist you in completing your evaluation of Mr. Thompson?

A. If I administered any further tests, I think that I would like to administer the thematic and perception test that Dr. Copple administered to him in the early 1990s. I thought the results that he obtained at that time were quite interesting, and it would be interesting to see how that had changed over time.

Q. Any others?

A. None that I can think of. He's been given quite a large number of tests by all the psychologists who've had their hands on him over the last year.

Q. What remains to be done so that you can complete your evaluation of Mr. Thompson?

A. Are you asking me about the ideal world or the world of what minimum could I survive with in order to be secure about my opinions?

[51] Q. Why don't you give me both?

A. Okay. In the ideal world, I would have two or more further opportunities to spend time talking with Mr.

Thompson about his life and to be able to review with him information about his family life and his economic circumstances that has been revealed to me through other sources.

Typically I'm in a position where it's the individual him or herself who might be revealing those circumstances to me first, and then I might be seeking collateral information to substantiate. In this case, I don't have any of that information from Mr. Thompson and all of it from other people, so it would be very helpful to know, when confronted with the facts as they have been told to me, whether Mr. Thompson could let me know something about how that affected him emotionally.

That would let me be able to have opinions beyond simply what psychologists and psychiatrists know to be true statistically in certain circumstances. Then I would be able to know that that was true for Mr. Thompson as well.

Q. And minimally? I'm sorry. Are you through telling me what you need for the ideal world?

A. One more thing I think in the ideal world. I think I would like to speak with another relative or two.

[52] Q. Have you spoken to some relatives?

A. I have. This family has been able to help me understand a great deal of the early dynamics of Mr. Thompson's life, and, because he's such a poor historian – even was during the first visit – collateral witnesses in this case are quite important because, unlike how Mr. Thompson's been portrayed by Dr. Blau, Mr. Thompson's very reluctant to talk about whatever level of disability or illness or suffering he might have experienced, and

although we did talk about some of the same events in his family life that later I talked about with his grandmother and his sister, he certainly minimized the damage to him of those circumstances.

Q. Have you had a social history prepared on Mr. Thompson?

A. Not a formal social history, no.

Q. Do you intend to have one?

A. No, not at this time. I don't.

Q. I take it there has been no prior social history done on him that you've been provided. Am I correct in assuming that?

A. I think I have been provided it as part of the prison records. I mean, I think that there are social histories that are part of various evaluations that have [53] been done on him in the past. I don't know how formalized they are, but certainly there was some information about his family.

Q. You state that you've talked with his grandmother?

A. Yes.

Q. When was that?

A. Yesterday.

Q. First time?

A. First time.

Q. And his sister?

A. His sister, Nora Wharton.

Q. W-a-r-t-o-n?

A. W-h-a-r-t-o-n.

Q. And when did you talk with her?

A. Yesterday as well.

Q. First time?

A. Yes.

Q. Have you talked with any other family members about Mr. Thompson's background?

A. No.

Q. Have you attempted to talk with his brother?

A. His older brother, Curtis, is the person I was referring to earlier, and I did attempt to call his house at one point last night, and he was not at home.

[54] Q. Have you attempted to talk with any of Mr. Thompson's schoolteachers or school administrators?

A. No. I have, however, reviewed a large number of depositions and pieces of testimony that are those people that you're describing right now.

Q. Neighbors from when he was growing up, have you talked with any of them?

A. No, I have not.

Q. Just reviewed any testimony perhaps from them?

A. Yes. That's correct.

Q. Have you seen the – says here extract of Mr. Thompson's Navy records taken from trial counsel's file, post-conviction hearing Exhibit 3. That does not include the actual transcript of his court-martial, does it? Have you reviewed the transcript of his court-martial, called the record of trial?

A. I'm trying to think if the actual transcript is in there. I think that in that exhibit is a summary of the transcript, a factual finding. I don't know if I have – yeah, I think I have seen the testimony of at least some of the witnesses, so it may be that the answer to your question is yes and I don't know.

Q. Or perhaps it's just the summary of the testimony of the witnesses?

A. Perhaps it is, but I don't think so.

[55] Q. The record of trial, I believe, would be this size document (indicating), and it's about ¾ to an inch thick I believe.

A. I think that is part of the packet that I received.

Q. Have you attempted to contact any of his supervisors in the military?

A. No.

Q. Have you talked with his former girlfriend, Arlene?

A. Cajulao. No, I did not. I actually interviewed Mr. Chavis, who spent – let me see if it was three or four days – with her. It looks like from July 29th through August 2nd of last year, 1998, interviewing her in Honolulu, Hawaii. Mr. Chavis and I have talked about the content of

his interviews with Ms. Cajulao on several occasions over the last several months.

Q. Did you find her observations of Mr. Thompson beneficial to you?

A. I did.

Q. Basically what about her observations was beneficial? What points did she bring out that you find important in reaching your diagnosis?

A. Ms. Cajulao described to Mr. Chavis that during [56] the course of the four-year relationship she had with Mr. Thompson, Mr. Thompson became increasingly bizarre in behavior that he exhibited. There were a number of occasions in which there were incidents that took place in the military that he described to her as him having been attacked. The facts of the situation may in fact not be that, but that was his description to her, that he was being picked on, that he was being bullied, that he was being attacked.

He became depressed, according to her, over time and increasingly paranoid. At some point she would come home from work, and he would be in their home with the curtains drawn, standing by himself in the dark telling her that people were after him and that he didn't want people to be able to look at him through the windows. She remembers being quite concerned about his behavior.

There are a couple of situations that she described to Mr. Chavis in which, with no external provocation that she could identify, Mr. Thompson became quite violent with her, and she saw those behaviors as very unusual for him and reported to Mr. Chavis that Mr. Thompson seemed unaware of what had provoked it and didn't even seem

after the fact to remember what had taken place, would simply, after a period of time, [57] calm himself down and return to normal behavior. I found all of that quite significant.

Q. How did he become violent with her?

A. There's one episode described in which they're in the kitchen cooking dinner or cleaning up the dishes, and he actually threatened her with a knife. He told her that he was going to kill her.

Q. Any other specific violent episodes related to you?

A. There's an incident in which I believe he struck her.

Q. With his fist or with an object?

A. With some part of his body. I think he may have grabbed her around the neck.

Q. Do you know whether or not she ever reported any of these assaults on her?

A. I don't know.

Q. How was this information conveyed to you? Was this a written statement that Mr. Chavis had taken from Ms. Cajulao? Is that how you pronounce it?

A. Cajulao is what he tells me.

Q. Cajulao.

A. Yes.

Q. Was this a written statement, or are these Mr. Chavis's notes that you have relied on?

[58] A. They're his notes I've relied on. It's an oral report that he made to me, and I've made some notes of that report.

Q. So he did not actually give you his notes?

A. That's correct.

Q. The notes that you made, are they among the materials that are going to Dr. Blau?

A. Yes.

Q. Have you talked with Mr. Thompson's trial attorneys in this matter?

A. I have not.

Q. Do you intend to?

A. Again, it's a wonderful idea. That might be a really significant source of information. In reality, in the duration of an evaluation, anyone who can provide me with information about Mr. Thompson increases the depth of my understanding of him, and so that would be a very nice thing.

Q. What about his post-conviction attorneys?

A. My opinion about that is exactly the same.

Q. Have you talked to them?

A. No, I have not talked to them.

Q. Have you talked to any other custodial officers out at River Bend other than the two that you mentioned you spoke to on 2 February of this year?

[59] A. Not about Mr. Thompson, no.

Q. You've talked to other custodial officers simply about getting in and out of the prison? Administrative type things?

A. Sometimes I've talked to them about whether they like their jobs, or they wanted to know what work was like in North Carolina, so it might be that kind of conversation.

Q. Since I just received this report at the outset of the deposition, I haven't really had a chance to go through it. Is this a preliminary report, then, since you haven't completed your evaluation?

A. It's somewhere between a preliminary report and an amended report and amendments that will be attached to it. Let me say it better than that. I think that I have enough information about Mr. Thompson so that I am comfortable with the opinions that I suggest, that I make in this document. I think that as additional information is forthcoming it will add to the depth and the complexity of my understanding.

MR. PRUDEN: I think at this time what I'd like to do is, since I've had you talking for over an hour now, why don't we go ahead and take a break for maybe about 15 minutes or so, and that'll give me an opportunity to take a look at the report, and that might [60] expedite things.

(Recess from 2:35 p.m. to 2:48 p.m.)

BY MR. PRUDEN:

Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying

significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

A. During my interview with Mr. Thompson's sister – and let me say all of her names – Ms. Nora Jean Hall Wharton, Ms. Wharton spontaneously began to talk to me about Mr. Thompson's behavior in the time period immediately following their mother's death.

By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. She would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

One of the things that we know about people who develop thought disorders is that frequently in childhood [61] you'll see one or more peculiarities in behavior. This would certainly fit in that category. She recalls other instances.

Q. Sort of a self-punishment or a self-exorcism type thing?

A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of

torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript. She told me much more detail about actually the extent of those kind of emotional outbursts.

At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the time, and Nora Wharton was not really permitted much interaction [62] outside of their home.

Q. Did Ms. Wharton tell you how she was beaten?

A. Yes. She was beaten with what she referred to as a tennis shoe on one occasion.

Q. Like a sneaker?

A. Yes. In the street in front of the neighbors, beaten to the point where she had to be assisted in walking home afterwards. She was beaten with an electrical cord at some point. Mr. Thompson observed both of those beatings and became hysterical.

She recalled another episode during which her biological father was brutally beating and raping their mother on the floor in front of them when the children were quite small, perhaps Mr. Thompson was himself three or four. She was maybe four or five. Mr. Thompson's reaction to that was to stand and scream and scream and scream and scream during the entire episode.

Any of the – taking the self-injury aside, setting that aside, any one of those behaviors in isolation might not be particularly significant. Putting them together, we begin to see a pattern of intense emotional reactivity.

Q. So basically, if I understand it, it's the self-injurious behavior and the crying and the way you see him reacting to these physical abuses of others?

[63] A. Yes.

Q. And that is indicative of a sign of mental illness to you? I just want to make sure that I'm understanding what you're telling me. If I'm not, please explain it to me.

A. I think I understand your question. It is an early indicator of a problem that's likely to develop. With the benefit of hindsight, it takes on the significance of a precursor, because then we see the escalating pattern of dysfunction and abnormality.

Q. Sort of a causal relationship is what you're seeing developing?

A. I'm not sure what causes what. There are often early indices of later mental illnesses that you don't know exactly what it's going to look like later, but you realize in looking at the child that there's a high likelihood that something is not going to be right when that person achieves maturity.

Q. Because of the environment, for example, in which he's growing up?

A. Perhaps. Perhaps because of the genetics involved. Perhaps because of the situations he's exposed to, as you said, the environment. Perhaps because of

whatever factors there are. Perhaps nutrition plays a role in this. These children were without food for [64] significant periods of time as well. I don't know all of the reasons, but what I know is that if you look back in the childhood of this man, the beginnings of mental illness are apparent.

Q. Besides Ms. Wharton's report of lack of food, have you seen any evidence that the children were taken away because of malnutrition?

A. No. Ms. Wharton did tell me, however, that there was a neighbor who had planned to make a report to Social Services, so perhaps I'll have the opportunity to interview that neighbor as well.

Q. And is there authority in terms of – strike that. You don't know to what degree the children were malnourished then?

A. No, I don't know. I do know that – and this is confirmed by the grandmother – in the six weeks approximately following their mother's death, the children were left alone virtually all of the time because Ms. Lamar was drunk and in bed, and so we have a five, a six, and a seven-year-old child in a house with no food. They would occasionally steal money from underneath her mattress while she was sleeping, and one of them would go to the store to try to find some food. Occasionally a neighbor would provide them with a meal or a can of food. I don't know whether they were [65] malnourished over an extended period of time. I do know that there is, from Ms. Wharton's perspective, rather serious psychological damage from that time.

Q. You have no medical documentation showing any malnourished condition or that it's caused some problem with his brain, do you?

A. I don't. These children were never taken to the doctor, so there wouldn't be any medical documentation. There's probably documentation in the school system. According to Ms. Wharton, Ms. Lamar was so drunk at the beginning of the school year following their mother's death that she forgot to sign the children up for lunches at school. They didn't have anything to eat during the day, so they forged her signature on a permission slip so that they could eat. They were discovered and punished by the school superintendent people, and a form was sent home to Ms. Lamar. She then signed it, and the children were able to eat lunch after that point. A couple weeks passed for all of that to get straightened out.

Ms. Wharton has undergone a lot of therapy in recent years and says that she's now able to describe situations that she wasn't very comfortable acknowledging to herself, these being one of them.

Q. Your diagnosis for Mr. Thompson is [66] schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much

exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur – lots of different kinds of delusions actually – auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

The psychological testing early on in Mr. Thompson's incarceration confirm the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

[66] The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

A. Well, it's interesting, because the state Court of Appeals actually notes this, that prior to his entry into the military Mr. Thompson is described almost uniformly – well, in fact, uniformly according to their opinion – as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

At some point – and we don't know, because I haven't seen any psychiatric records from the military at this point; I don't know if there are any – we don't know whether or not the change in Mr. Thompson is perceived as other than behavioral disruption, but, in fact, his description of that time is that he began to notice that

people were trying to hurt him all the time, that officers and other people of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found [68] out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

Q. This is what he related to you during your interview last August?

A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, "different." Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him [69] as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her

life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her to approach her grandmother about what to do for treatment for him.

Q. Did they ever attempt to get treatment for him?

A. No, they did not.

Q. And did they say why?

A. No. Ms. Wharton did not say why. She said that she felt greatly guilty about that.

Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

A. There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are [70] frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

Q. Meaning?

A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

Q. When you say "he's not in control of what he's doing," are you saying that it's impulsive behavior?

A. If I am emotionally disregulated, if I'm overaroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I [71] also think things are going on that aren't, I have a combination in which yes, I suppose you could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

Q. Does this disorder prevent Mr. Thompson from planning his activities?

A. Sometimes, yes, it does.

Q. And so the inability to plan, would that be a factor that would prevent him from conforming his conduct to the requirements of the law?

A. If that were in operation at some time. In the history of the Department of Corrections' mental health records, when he's properly medicated I don't think that's true about him.

Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicated he does not always have the ability to plan?

A. Those two things are true. It's also true that if he's inadequately medicated or improperly medicated he doesn't have the ability to plan anything. I don't know whether he has impulses. I think he's all impulse, so to have impulses implies that there's a part of you that's not impulsive. For example, when Mr. Chavis and I saw [72] him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that's why I have to put that qualifier in there.

Q. What evidence prior to his incarceration do you have that Mr. Thompson was hallucinating or suffered hallucinations – excuse me, experienced hallucinations?

A. Well, the evidence of hallucinations is an interesting thing since the only way that we know if somebody is hallucinating is if they tell us. If you're asking me if there's documentation, the answer is no, because Mr. Thompson never was taken for treatment as best I know. He doesn't remember, at least according to his report to me, whether he received any treatment in the military. He remembers being told that he needed treatment in the military, and he remembers that he thought he wanted to see a psychiatrist in the military. He cannot remember if he actually ever saw such a doctor. It's possible that there

are records that exist that will have exactly the evidence that you're talking about, but I haven't seen them.

Q. Have you attempted to obtain his military medical records?

A. Do you mean have I asked Mr. Chavis to get [73] those for me? Yeah, I have. I don't know what they'll show. I rather suspect that Mr. Thompson never received any medical treatment of a psychiatric nature in the military. He didn't like to tell anyone about what was happening to him. The evidence that I have has to do with the reports of people who observed him, who observed him moving his lips and talking when there wasn't anyone present, that being his grandmother.

Q. And this is after his return, correct?

A. Yes. And I have Mr. Thompson's report. He wasn't happy to talk about it is my opinion, but he acknowledged to me that it's possible that when he thought he was being followed while he was in the military that maybe there wasn't anyone there. And when he saw people looking in his window, which would qualify as hallucination, it's possible that there wasn't anyone there looking at him either.

Q. Do you know if Mr. Thompson has filed any kind of claim with the Veterans Administration for his condition while in the military?

A. I don't have any idea.

Q. Any other evidence in the record prior to his incarceration that would be indicative to you that he was experiencing hallucinations –

A. No.

Q. [74] – other than his self-report?

A. And the report of the sister and his grandmother. Are we talking about just documents?

Q. Yes.

A. No. No documents.

Q. Or any other reports from other individuals?

A. Not at this time, no.

Q. Bear with me for just a minute, please.

A. Sure.

Q. You're familiar are [sic] the term malingering?

A. I am.

Q. What steps during your evaluation process have you undertaken to determine whether or not Mr. Thompson might be malingering?

A. The MMPI-2 has several scales that are set aside to elicit the possibility of trying to portray one's self in an inaccurate manner. Mr. Thompson performed within normal levels on all the validity scales. Dr. Blau gave Mr. Thompson several measures of malingering, and he scored within normal limits on all of those. There are normal test results found within the prison records, and I have my almost 20 years as a clinical psychologist with which to make clinical judgments.

MR. PRUDEN: I believe that's all the questions [75] I have. Steve?

MR. KISSINGER: None.

(Signature reserved.)

(Whereupon, at 3:16 p.m., the taking of the instant deposition ceased.)

_____
Signature of the Witness

SUBSCRIBED and SWORN TO before me this ___ day of ___, 19__.

_____
NOTARY PUBLIC

My commission expires: _____

[76] ERRATA SHEET

RE: GREGORY THOMPSON v. RICKY BELL, WARDEN

DEPOSITION OF: FAYE E. SULTAN, PH.D.

Please read this original deposition with care, and if you find any corrections or changes you wish made, list them by page and line number below. DO NOT WRITE IN THE DEPOSITION ITSELF. Return the deposition to this office after it is signed. We would appreciate your prompt attention to this matter.

To assist you in making any such corrections, please use the form below. If supplemental or additional pages are necessary, please furnish same and attach them to this errata sheet.

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DHL

[78] CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)
COUNTY OF CABARRUS)

I, Dayna H. Lowe, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto,

nor financially or otherwise interested in the outcome of the action.

/s/ Dayna H. Lowe
DAYNA H. LOWE
Court Reporter
Notary Public in and for
County of Cabarrus
State of North Carolina

My commission expires July 22, 2002.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

GREGORY THOMPSON, *Petitioner*, v. RICKY BELL, WARDEN, Riverbend Maximum Security Institution, *Respondent*.	)	No. 4:98-cv-006 *Edgar*

ORDER

(Filed Feb. 17, 2000)

For the reasons expressed in the Court's memorandum filed herewith, it is hereby **ORDERED** that the respondent's motion for summary judgment (Court File No. 7) is **GRANTED**. The petition (Court File No. 3) of Gregory Thompson for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DISMISSED**.

Additionally, the Court has reviewed this case pursuant to 28 U.S.C. § 1915(a)(3) and Rule 24 of the FEDERAL RULES OF APPELLATE PROCEDURE and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, any application by Thompson for leave to proceed *in forma pauperis* on appeal is **DENIED**. 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24.

If any appeal is taken from this action, such notice will be treated as an application for a certificate of appealability, which is hereby **DENIED** since Thompson has failed to make a substantial showing of the denial of a

constitutional right. 28 U.S.C. § 2253(c)(2); Rule 22(b) of the FEDERAL RULES OF APPELLATE PROCEDURE.

The petitioner's execution was previously stayed pending further orders of this Court. The **STAY WILL REMAIN IN EFFECT** pending any appeal.

It is **SO ORDERED**.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5516

GREGORY THOMPSON,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

Before: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

JUDGMENT

(Filed Jan. 9, 2003)

On Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 1, 2003

Ms. Jennifer L. Smith
Assistant Attorney General
PO Box 20707
Nashville, TN 37202-0207

Re: Gregory Thompson
v. Ricky Bill, Warden
No. 03-5759

Dear Ms. Smith:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 20, 2004

Ms. Jennifer L. Smith
Assistant Attorney General
PO Box 20707
Nashville, TN 37202-0207

Re: Gregory Thompson
v. Ricky Bill, Warden
No. 03-5759

Dear Ms. Smith:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 7, 2005

Ms. Jennifer L. Smith
Associate Deputy Attorney General
PO Box 20207
Nashville, TN 37202-0207

Re: Ricky Bell, Warden
v. Gregory Thompson
No. 04-514

Dear Ms. Smith:

The Court today entered the following order in the above-entitled case:

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question two presented by the petition.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

---

(5)

No. 04-514

FILED
FEB 23 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE
QUESTION PRESENTED

Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Fed. R. App. P. 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) that is the subject of this case is published at 373 F.3d 688. The earlier opinion of the court of appeals affirming the district court's denial of habeas corpus relief (Pet. App. 117) is reported at 315 F.3d 566. The memorandum opinion of the district court dismissing respondent's petition for writ of habeas corpus is unreported. (Pet. App. 202)

JURISDICTION

The judgment and opinion of the court of appeals were entered on June 23, 2004. (Pet. App. 1) The petition for a writ of certiorari was filed on October 14, 2004,[1] and granted on January 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 41(d)(2), Federal Rules of Appellate Procedure, provides in pertinent part:

> (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

[1] On September 17, 2004, Justice Stevens granted petitioner's application to extend the time to file a petition for writ of certiorari from September 21, 2004, until October 14, 2004. *Bell v. Thompson*, No 04A211.

* * *

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

STATEMENT OF THE CASE

In 1985, Gregory Thompson was convicted by a jury in Coffee County, Tennessee, for the first-degree murder of Brenda Blanton Lane on New Year's Day of that same year. Following a separate sentencing hearing, the jury sentenced Thompson to death for the murder. Thompson's conviction and sentence were affirmed on direct appeal, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990), and later upheld in state post-conviction proceedings. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997). Thompson then sought a writ of habeas corpus in the federal district court, which summarily denied relief, and the Sixth Circuit affirmed that decision. (Pet. App. 117) On December 1, 2003, this Court denied Thompson's petition for a writ of certiorari (J.A. 91) and denied rehearing on January 20, 2004. (J.A. 92)

On February 25, 2004, the Tennessee Supreme Court set a date for Thompson's execution, thus setting in motion state judicial proceedings to carry out that execution in accordance with Tennessee state law. (Pet. App. 349-51, 383) But while state-court proceedings were ongoing – and unbeknownst to the parties in this action or the Tennessee Supreme Court – the Sixth Circuit was conducting a second *sua sponte* review of Thompson's federal habeas

appeal. (Pet. App. 2) And, on June 23, 2004, 18 months after its initial decision denying habeas corpus relief and 205 days after this Court denied certiorari, the Sixth Circuit, relying on its "inherent power over a case until [its] mandate issues," withdrew its previous judgment and opinion and remanded the case to the district court for an evidentiary hearing on Thompson's original habeas petition. (Pet. App. 6)

A. State Trial Proceedings

As summarized in the opinion of the Tennessee Supreme Court on direct appeal, the proof at Thompson's trial showed that, on December 29, 1984, Thompson and Joanne McNamara, a juvenile female, traveled by bus from Marietta, Georgia, to Shelbyville, in Bedford County, Tennessee. They presented themselves as a married couple at the home of Willa Mae Odum, an acquaintance of McNamara's family, who allowed them to stay there. When Ms. Odum learned the two were not married, she asked Thompson to leave, but he remained through the night of December 31, waiting for a relative to wire him some money. The following morning, January 1, 1985, Odum again insisted that Thompson leave, and she called the authorities to report McNamara as a runaway. This call apparently prompted the couple to depart Odum's home. Having little money and no transportation, the couple spent the afternoon at a nearby Wal-Mart store.

That same afternoon, January 1, after making several purchases at the Wal-Mart, Brenda Lane did not arrive home when expected. Shortly after midnight, Lane's automobile was reported on fire near an apartment building in Marietta, Georgia. Thompson and McNamara were

arrested on the night of January 2 in connection with the investigation of Lane's disappearance. A traffic ticket in Thompson's jacket showed that he had been cited for speeding while driving Brenda Lane's vehicle on Interstate 24 in Tennessee near the Georgia line. A Wal-Mart receipt and several items recovered from the vehicle indicated a purchase at the Shelbyville Wal-Mart at 5:51 p.m. on January 1. A button found in Lane's car matched those on Thompson's clothing.

A few hours after being taken into custody, Thompson admitted that he had abducted a woman at knifepoint from the Wal-Mart in Shelbyville and forced her to drive him and his companion in her car to a remote location outside Manchester, Tennessee. There, according to Thompson, he stabbed her, drove the car over her body, and left. Thompson drew a map illustrating the route from the town to the site of the stabbing and spoke with authorities by telephone to clarify certain aspects of his directions.

On January 3, 1985, following Thompson's directions, a search team found Brenda Lane's body at the location described in Thompson's statement. According to the pathologist, she had died from multiple stab wounds to the back and would have remained conscious five to ten minutes before bleeding to death. Apart from the stab wounds, there was no evidence of other injury or trauma to Lane's body. Thompson presented no proof in the guilt phase of trial, and the jury convicted him of the first-degree murder of Brenda Lane.

During the sentencing phase, Thompson called a number of witnesses, including former high school teachers, acquaintances, his grandparents, two siblings, and a

cousin, who presented a picture of him as non-violent, cooperative and responsible. Witnesses described in detail his childhood and family circumstances in Georgia until he left in 1979 to join the Navy. The Tennessee Supreme Court noted in its opinion on direct appeal that, "while [Thompson's] family was poor, it was also good and loving." *State v. Thompson*, 768 S.W.2d 239, 244 (Tenn. 1989).

Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, testified that she knew Thompson from December 1980 until June 1984. She described their relationship as good, one that she was "very proud to have experienced," and stated that Thompson was caring and sensitive. She related that Thompson had suffered a head injury when three of his fellow service members attacked him with a crowbar and that he became paranoid and unreasonably concerned about his and her personal safety thereafter. Cajulao was aware that Thompson was discharged from the Navy as a result of being court-martialed for shoving a petty officer and either dislocating the officer's shoulder or breaking his collar bone. She was also aware of other violent incidents involving Thompson and other Navy personnel. After leaving the Navy, Thompson returned to Georgia for a short time in 1983 and then in 1984 to look for work. Thompson's sister, Nora Jean Walton, and his brother-in-law testified about Thompson's activities in Georgia after he returned from the Navy, including his relationship with co-defendant Joanne McNamara.

Dr. George Copple, a clinical psychologist retained by the defense who interviewed and tested Thompson before trial, testified about Thompson's personality and aptitude for employment in prison. He opined that Thompson had an unusually strong need to nurture other people, which

may have led, in part, to the commission of the offense in this case. Dr. Copple further testified that Thompson exhibited strong remorse for the killing and did not have an adult anti-social personality disorder.

To rebut Dr. Copple's testimony, the State presented the deposition of Dr. Robert Glenn Watson, a clinical psychologist who participated in a staff evaluation of Thompson at Middle Tennessee Mental Health Institute (MTMHI) shortly after his arrest. Dr. Watson testified that Thompson showed little remorse and exhibited adult anti-social behavior. He further stated that, during the pre-trial evaluation period, Thompson appeared to fake schizophrenia by claiming to hear voices and also falsely claimed that he was unable to read. *Thompson*, 768 S.W.2d at 244.

The jury sentenced Thompson to death after finding three aggravating circumstances beyond a reasonable doubt: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (2) that the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution; and (3) that the murder was committed while the defendant was engaged in committing robbery or kidnapping. Tenn. Code Ann. § 39-2-203(i)(5), (6), (7) (1982) (repealed). The Tennessee Supreme Court affirmed the judgment, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and this Court denied certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990).

B. State Post-Conviction Proceedings

On post-conviction, Thompson contended, *inter alia*, that his trial counsel was ineffective for failing to investigate head injuries he had suffered prior to the murder. He

claimed that evidence of the head injuries could have been beneficial to his case in the penalty phase of his trial. The post-conviction court rejected Thompson's claims following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed the denial of the petition for post-conviction relief, finding that counsel's decision to "emphasize [Thompson's] positive qualities [at sentencing] rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation." *Thompson v. State,* 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). The court further found that Thompson had demonstrated no prejudice from counsel's alleged deficiencies, because he "failed to established that the head injuries had any effect upon his mental stability at the time of the murder" and "failed to demonstrate that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Id.* Thompson subsequently sought permission to appeal to the Tennessee Supreme Court pursuant to Rule 11, Tennessee Rules of Appellate Procedure, but that court denied his application on October 20, 1997.

C. Federal Habeas Corpus Proceedings

On June 12, 1998, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. On February 17, 2000, the district court entered an order summarily denying Thompson's claims for relief and dismissing his petition, concluding that Thompson had failed to demonstrate that the state court's adjudication of his ineffective assistance of counsel claim involved an unreasonable application of established federal law or an unreasonable determination of the facts in light of the evidence before the state court.

28 U.S.C. § 2254(d)(1). (Pet. App. 202, 271) The district court specifically found that Thompson had presented no competent evidence in response to the State's motion for summary judgment, by way of affidavit, deposition or otherwise, demonstrating that he was suffering from a significant mental disease at the time of the offense or at trial that should have been presented to the jury during the penalty phase of his trial as mitigation evidence. (Pet. App. 270) The court further noted that Thompson "had two different psychological evaluations [prior to trial] and both resulted in findings of competency at the time of the crime and at the time of trial." In addition, the state-court record supported the state post-conviction court's determination that trial counsel reasonably investigated Thompson's background and mental health history. (Pet. App. 270-71)

Thompson appealed the district court's decision to the Sixth Circuit on April 21, 2000. (J.A. 2) On March 1, 2001, while Thompson's appeal was pending in the Sixth Circuit, but before oral argument, Thompson filed a motion in the district court under Rule 60(b), Federal Rules of Civil Procedure, requesting the district court to "supplement" the record with additional evidence that had been developed through discovery in the federal habeas proceeding but had never been presented to the district court and, in light of that evidence, to "revisit [the court's] previous summary denial" of Thompson's habeas petition. (Pet. App. 337, 340-41)

Contemporaneous with the filing of his Rule 60(b) motion in the district court, Thompson filed a motion in the Sixth Circuit seeking to hold his appeal in abeyance pending the district court's disposition of the Rule 60(b) motion. (Pet. App. 333) The district court denied Thompson's Rule 60(b) motion on March 7, 2001 (Pet. App. 343), and the Sixth Circuit

denied Thompson's motion to hold his appeal in abeyance on March 21, 2001. (Pet. App. 345)

On January 9, 2003, the Sixth Circuit affirmed the district court's denial of habeas relief. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003). (Pet. App. 117) As to Thompson's ineffective assistance claim, the court observed that, because the Tennessee courts analyzed the claim under the appropriate standard established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the question to be decided was whether the state court unreasonably applied *Strickland* to the facts of Thompson's case under 28 U.S.C. § 2254(d). (App. 154) The court of appeals found that the state-court record reflected that counsel adequately investigated Thompson's mental health:

> [T]he [state-court] record reflects that trial counsel investigated Thompson's mental health and that he received expert assistance to attempt to establish valid mitigating factors. The record shows that trial counsel were aware from the outset of Thompson's prior head injuries and inappropriate behavior, and that they investigated possible mental illness or defect. They requested a competency evaluation. Thompson was evaluated for thirty days by a team of experts. The MTMHI team found no mental illness, mental defect, or insanity. Counsel also had [Dr. George] Copple, a clinical psychologist and former professor of psychology at Vanderbilt, evaluate Thompson. Copple found no evidence of mental illness.
>
> * * *
>
> [N]ot one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial.

[Dr. Gillian] Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stating simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. Similarly, neither Crown nor Sultan [Thompson's federal habeas experts] ever expressed an opinion that Thompson was mentally ill at the time of the crime.

* * *

As the Tennessee Court of Criminal Appeals held, there is no prejudice because, "[t]he petitioner has failed to establish that the head injuries had any effect upon [Thompson's] mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Thompson*, 958 S.W.2d at 165.

* * *

Indeed, although the state court ruled on the prejudice prong of *Strickland*, its ruling is equally sustainable under the cause prong of *Strickland* because trial counsel's decision to employ a clinical psychologist at trial was not objectively unreasonable. Further, as the Tennessee Court of Criminal Appeals concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* Nor can there be prejudice because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime. Thus, the state court's decision holding

that counsel were not ineffective under the Sixth Amendment is not an unreasonable application of *Strickland*.

(Pet. App. 158-59, 163-64)

Thompson filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Sixth Circuit. The panel reviewed the petition and, after finding that the issues raised were fully considered upon the original submission and decision of the case, denied rehearing on March 10, 2003. (Pet. App. 346) On March 24, 2003, the court of appeals stayed the issuance of its mandate pending the filing and disposition of a petition for writ of certiorari. (Pet. App. 347)

On August 6, 2003, Thompson filed a petition for writ of certiorari in this Court. The Court denied Thompson's petition on December 1, 2003. *Thompson v. Bell*, 540 U.S. 1051 (2003). (J.A. 91) The following day, December 2, 2003, Thompson filed a motion in the court of appeals to extend the stay of the mandate pending a petition for rehearing in this Court from the denial of his certiorari petition. (J.A. 8) This Court's order denying certiorari was filed with the clerk of the court of appeals on December 8, 2003. (J.A. 8) The Sixth Circuit granted Thompson's motion to extend the stay of the mandate on December 12, 2003, pending the filing of a petition for rehearing and "thereafter until the Supreme Court disposes of the case." (Pet. App. 348) Thompson filed a petition for rehearing in this Court on December 22, 2003. On January 20, 2004, the Court denied Thompson's petition for rehearing. *Thompson v. Bell*, 540 U.S. 1158 (2004). (J.A. 92) A copy of the Court's order denying rehearing was filed with the clerk of the court of appeals on January 23, 2004. (J.A. 8)

D. Events Subsequent to Initial Habeas Disposition

On February 25, 2004, the Tennessee Supreme Court ordered that Thompson's death sentence be carried out on August 19, 2004. In addition, finding that Thompson had sufficiently raised the issue of his present competency to be executed through his Notice of Incompetency to be Executed and supporting exhibits, the court remanded the case to the trial court where Thompson was originally convicted and sentenced for an "expeditious determination" of Thompson's competence for execution under the procedures established in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).[2] (App. 349-51)

On March 1, 2004, Thompson filed a "Petition Providing Notice of Incompetency to Be Executed, Requesting a Hearing on Competency to Be Executed, and Requesting an Order Finding Gregory Thompson Incompetent to Be Executed and Issuance of a Reprieve" in the state trial court. Accompanying his petition were, *inter alia*, three mental health experts' reports, all dated after this Court's denial of certiorari, opining as to Thompson's present competence. On March 8, 2004, the trial court denied Thompson's competency petition without a hearing, and, following expedited review, the Tennessee Supreme Court affirmed the judgment of the trial court in an opinion filed on May 12, 2004. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). (Pet. App. 352)

[2] In *Van Tran*, the Tennessee Supreme Court adopted the standard of competency for execution in Tennessee and established state-court procedures to enable state prisoners to assert last-minute claims of incompetence under *Ford v. Wainwright*, 477 U.S. 399 (1986).

On June 14, 2004, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, asserting a claim of incompetency for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). On June 21, 2004, the district court granted a "brief stay" of Thompson's execution, with the stay to expire automatically upon issuance of an order of the court denying habeas relief but to remain in place upon issuance of an order granting the writ. The district court further ordered that the Warden file a response to Thompson's *Ford* petition within ten days of the date of the order.

On June 23, 2004, nearly seven months after this Court denied certiorari from the Sixth Circuit's January 2003 decision, that court issued an opinion vacating the district court's February 2000 order dismissing Thompson's initial habeas petition, supplementing the record on appeal with a deposition that had been attached to Thompson's March 2001 motion to hold his appeal in abeyance but never presented in the habeas proceedings in the district court, and remanding the case to the district court for a "full evidentiary hearing" on Thompson's initial habeas petition. (Pet. App. 5-6) The court reasoned that a discovery deposition of a mental health expert, taken by counsel during the federal habeas proceedings but never submitted to the district court for consideration in connection with the warden's motion for summary judgment, was "extremely probative" in assessing Thompson's mental state at the time of the crime and, thus, relevant to his claim of ineffective assistance of counsel at sentencing. (Pet. App. 2) While acknowledging that the deposition was outside the record of the district court, the court of appeals nevertheless considered it in rendering its opinion pursuant

to the court's "equitable power to supplement the record on appeal," finding that the deposition was "apparently negligently omitted" by Thompson's habeas counsel.[3]

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to [the Warden] as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.

(Pet. App. 5-6) The court made no finding that Thompson was not at fault in failing to develop mental health evidence in state court or that the limitations set forth in 28 U.S.C. § 2254(e)(2) were satisfied in order to justify its directive for a "full evidentiary hearing." Indeed, the court's previous opinion indicated to the contrary. (App. 169-70) In justifying its action, the court invoked its "inherent power to reconsider [its] opinion prior to the issuance of the mandate." (App. 6)

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[3] In his concurring/dissenting opinion, Judge Suhrheinrich found habeas counsel's explanation for the omission of the deposition to be "implausible, if not intentionally false," and thus justified the court's late intervention on grounds of a fraud upon the district court. (App. 82, 89-107) The panel majority, however, declined to join in that conclusion. (App. 2)

SUMMARY OF THE ARGUMENT

The Sixth Circuit's decision withdrawing its final judgment affirming dismissal of Thompson's habeas corpus petition and permitting him to relitigate the merits of his case is an extraordinary act equivalent to a recall of the mandate. In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court held that, given a State's strong interest in the finality of its criminal convictions, a federal court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas relief to a state prisoner unless it acts to avoid a miscarriage of justice. *Calderon*, 523 U.S. at 557-58. Although acknowledging *Calderon*'s restrictions on a court of appeals' ability to recall an already issued mandate, the Sixth Circuit in this case saw no such restriction of its ability to reconsider the merits of Thompson's appeal, even after this Court had denied certiorari review, because of its "power over a case" until issuance of the appellate mandate. (Pet. App. 6)

But the Sixth Circuit's rationale fails for two reasons. First, the court's actions violate the plain language of Fed. R. App. P. 41(d)(2)(D), which requires that the mandate issue "immediately" upon the filing of the order of this Court denying certiorari. Because the Sixth Circuit had no discretion to withhold issuance of the mandate beyond the filing of this Court's order denying certiorari, the court's subsequent withdrawal of its judgment denying federal habeas relief – in reliance upon its improperly withheld mandate – was an extraordinary act equivalent to a recall of the mandate. And in the federal habeas context, where a prisoner seeks relief from a criminal judgment entered by a state court, this Court has made clear that a decision to

recall a mandate must be measured against the statutory and jurisprudential limits applicable in habeas cases.

Aside from its clear violation of Rule 41(d)(2)(D), the Sixth Circuit's withdrawal of its judgment after finality had attached – premised upon the notion that it retained unfettered discretion to reconsider its decision before issuance of the mandate – is inconsistent with the principles of finality and comity underlying *Calderon*. Indeed, applying those principles, this Court's denial of certiorari – the point at which "finality" attached to the Sixth Circuit's judgment – triggered *Calderon*'s miscarriage of justice standard as a prerequisite to any reconsideration by the Sixth Circuit of the merits of the petition, irrespective of whether the appellate court mandate had in fact issued. Issuance of the mandate is a purely ministerial function unrelated to the adjudication of an appeal. And where, as in this case, the court of appeals' judgment of affirmance required no further action in the district court save filing of the judgment in the court below, the finality of federal habeas corpus proceedings is not contingent upon the performance of that residual ministerial function. Indeed, the State's strong interest in the "assurance of finality" beyond that point is indistinguishable from that which *Calderon* sought to protect. *Calderon*, 523 U.S. at 558.

When viewed under the appropriate standard, the Sixth Circuit's decision to withdraw its prior final judgment constitutes a grave abuse of discretion. In *Calderon*, this Court held that a court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Calderon*, 523 U.S. at 549-50. If the petitioner asserts his actual innocence of

the underlying crime, he must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, he must show by clear and convincing evidence that "no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.* at 559-60 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)). Neither standard is satisfied under the facts of this case.

First, the evidence upon which the Sixth Circuit based its decision – additional mitigation evidence relevant to the jury's decision to impose a death sentence – can never meet *Sawyer*'s "innocence of the death penalty" standard. While such evidence may be potentially relevant to the jury's selection of the appropriate penalty, it in no way undercuts the defendant's eligibility for the death penalty, which was conclusively determined at the point of Thompson's conviction for a death-eligible offense, *i.e.*, first-degree murder, and by the existence of at least one statutory aggravating circumstance. In this case, there were three.

Nor can Thompson meet *Schlup*'s "actual innocence" standard. Neither the initial nor subsequent opinion of the Sixth Circuit contains any suggestion that Thompson is "innocent" of first-degree murder, a result that is hardly surprising, since Thompson himself confessed to the crime and made no appreciable effort to contest his guilt at trial. Aside from the overwhelming evidence of guilt, the evidence on which the Sixth Circuit actually based its decision itself contains a concession of guilt by Thompson and thus, on its face, defeats any claim of "actual innocence." In sum, the evidence in this case falls far short of

the showing necessary to disturb the State of Tennessee's "all but paramount" interest in finality. Because Thompson has already had extensive review of his claims in both state and federal courts, "the State's interests in finality outweigh [his] interest in obtaining yet another opportunity for [federal habeas] review," *Calderon*, 523 U.S. at 557, and the Sixth Circuit's surprise reconsideration of its earlier decision – disturbing that finality interest in the absence of a threatened miscarriage of justice – constitutes a grave abuse of discretion.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION TO WITHDRAW ITS FINAL JUDGMENT AFFIRMING THE DISMISSAL OF THOMPSON'S FEDERAL HABEAS PETITION IS AN EXTRAORDINARY ACT EQUIVALENT TO A RECALL OF THE MANDATE UNDER *CALDERON V. THOMPSON*.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court held that, given a State's strong interest in the finality of its criminal convictions, a federal court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas relief to a state prisoner, unless it acts to avoid a miscarriage of justice. *Calderon*, 523 U.S. at 557-58. Finality, the Court reasoned, is not only "essential" to both the retributive and deterrent functions of criminal law but serves to "preserve the federal balance." *Id.* at 555. In the context of federal habeas review of state convictions, finality gains added significance because the proceeding, by its very

nature, "frustrates" the State's independent authority to execute its moral judgment.[4] *Id.* at 555-56. For this reason, *Calderon* restricted the ability of a court of appeals to recall a mandate denying federal habeas relief – a power that had historically been viewed as "inherent" – in order to ensure that the "merits of concluded criminal proceedings" not be revisited in the absence of a strong showing of actual innocence. *Id.* at 558.

In this case, however, the Sixth Circuit attempted to distinguish *Calderon* on the ground that the court had not yet issued its mandate when it withdrew its initial judgment 18 months after entry in order to allow Thompson to relitigate the merits of his petition in the federal district court. (Pet. App. 6) The Sixth Circuit's effort to defeat the finality of its judgment by withholding its mandate fails for two reasons. First, its action violates the plain language of Fed. R. App. P. 41(d)(2)(D), which requires, without exception, that the mandate issue "immediately" upon the filing of the order of this Court denying certiorari. Because the rule allows no discretion to withhold the mandate beyond that point, the Sixth Circuit's action was extraordinary and tantamount to a recall of the mandate. Second, the Sixth Circuit's withdrawal of its judgment –

[4] Recognizing that federal challenges to state convictions "entail greater finality problems and special comity concerns," *Engle v. Isaac*, 456 U.S. 107, 134 (1986) (Burger, C.J., concurring), the decisions of this Court in the federal habeas context impose significant limits on the discretion of federal courts to grant relief. *Calderon v. Thompson*, 523 U.S. at 554-55 (citations omitted). Those jurisprudential limitations reflect the Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id.* at 555. Likewise, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is grounded in "respect for the finality of state criminal judgments." *Id.* at 558.

an action indicative of a narrow, mandate-based view of finality – is inconsistent with an unbroken line of this Court's decisions holding that finality attaches at the point of "final adjudication" and is not contingent upon the performance of residual ministerial functions.

Where, as here, nothing remained to be done in the district court save filing of the Sixth Circuit's judgment affirming its decision, issuance of the mandate did not have the significance imputed to it by the Sixth Circuit; it was a purely ministerial function unrelated to the adjudication of the merits of the appeal. Instead, as *Calderon* makes clear, the central concern of AEDPA and this Court's habeas precedents is a State's assurance of "real finality" of its criminal convictions. *Id.* at 556-58. The Sixth Circuit's decision cannot be reconciled with these principles and should be reversed.

A. Because the Sixth Circuit had no discretion to withhold issuance of the mandate beyond the filing of this Court's order denying certiorari, the court's subsequent withdrawal of its judgment denying federal habeas relief was an extraordinary act equivalent to a recall of the mandate.

Following its initial disposition of Thompson's habeas appeal in January 2003, the Sixth Circuit denied rehearing and a suggestion for rehearing *en banc* on March 10, 2003, but stayed the issuance of the mandate pending a petition for writ of certiorari. (Pet. App. 346-47) The Court denied Thompson's certiorari petition on December 1, 2003, *Thompson v. Bell*, 540 U.S. 1051 (2003) (No. 03-5759) (J.A. 91); a copy of this Court's order denying certiorari was filed with the Clerk of the Sixth Circuit on

December 8, 2003. (J.A. 8) Instead of issuing the mandate "immediately," as required by Fed. R. App. P. 41(d)(2)(D), the Sixth Circuit entered an order on December 12, 2003, "extending the stay" to allow Thompson to file a petition for rehearing from the denial of the writ of certiorari and "thereafter until the Supreme Court disposes of the case." (Pet. App. 348; J.A. 8) On January 20, 2004, this Court denied Thompson's petition for rehearing. (J.A. 92) A copy of this Court's order denying rehearing was filed with the Clerk of the Sixth Circuit on January 23, 2004. (J.A. 8)

Rule 41, Federal Rules of Appellate Procedure, governs the procedures relating to the issuance and stay of a court of appeals' mandate.[5] Sub-section (b) of the rule provides that the mandate "must issue" seven calendar days after expiration of the time for filing a petition for rehearing, unless a petition is filed or a different time is set by order.[6] Once a petition for rehearing is filed, Rule

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[5] The mandate of an appellate court establishes the law binding further action in the litigation by another body subject to its authority. *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir. 1981). Functionally, the mandate is the formal vehicle for conveying the terms of an appellate court's disposition to the lower court. *Clarke v. United States*, 915 F.2d 699, 716 (D.C. Cir. 1990); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came").

[6] Rule 41(b) allows the time for issuance to be shortened or enlarged by court order. *See, e.g., Wolfel v. Bates*, 749 F.2d 7, 8 (6th Cir. 1984) (under Rule 41(b), court may "delay the date of the issuance of the mandate until the court determines whether to grant, deny, or remand to the district court the movant's request for attorney's fees"); *Perales v. INS*, 575 F.2d 1293, 1295 (9th Cir. 1978) (court ordered mandate affirming denial of reopening by Board of Immigration Appeals issued forthwith in case involving eight years of effort to avoid deportation).

41(b) automatically extends the time for issuing the mandate to seven days after entry of the order denying rehearing, unless otherwise ordered by the court.

Although Rule 41 permits the court of appeals to stay issuance of the mandate pending the filing of a petition for writ of certiorari, the unequivocal language of Rule 41(d)(2)(D) makes issuance mandatory upon the denial of certiorari: "The court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (emphasis added) By its terms, the rule leaves no room for the exercise of discretion by the court. In addition, unlike subsection (b), there is no provision under sub-section (d)(2)(D) authorizing a delay in the issuance of the mandate following the denial of certiorari. Indeed, even the Sixth Circuit's own rules expressly forbid it.[7] Rather, the issuance of the mandate upon receipt of an order of this Court denying certiorari is a ministerial act leaving no discretion or power to adopt some other course of action. In this case, that act should have been performed *immediately* upon the filing of this Court's order with the clerk of the court of appeals on December 8, 2003. Any further stay

[7] Rule 41(c), Rules of the United States Court of Appeals for the Sixth Circuit, provides: "A stay of the mandate pending application to the Supreme Court for a writ of certiorari *shall not be effective* later than the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. § 2102 or Rule 13 of the Supreme Court Rules, as applicable. If during the period of the stay there is filed with the clerk a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate *shall issue immediately*." (emphasis added)

of the mandate would have been justified only under the same exceptional circumstances permitting recall of the mandate. The Sixth Circuit, however, extended the stay of the mandate, in violation of Rule 41(d)(2)(D) and its own rules, pending the filing of a petition in this Court for rehearing of the denial of certiorari. Even assuming the court of appeals was authorized to enter such an order, the extended stay expired by its own terms when this Court disposed of respondent's petition for rehearing. (Pet. App. 348)

For reasons never explained by the court of appeals, however, the mandate was never issued. The Sixth Circuit entered no order further staying issuance of the mandate, let alone justifying a stay. The mandate simply did not issue. Five months later, on June 23, 2004, the Sixth Circuit suddenly withdrew its initial opinion and issued a second opinion, this time remanding the case to the district court for a "full evidentiary hearing" on respondent's federal habeas petition. The Sixth Circuit's only acknowledged source of authority for withdrawing its earlier opinion was its "inherent power to reconsider [the] opinion prior to issuance of the mandate." (Pet. App. 6) But while federal courts are undoubtedly vested with certain inherent authority over their proceedings and judgments, that authority may not be invoked to circumvent either federal statutes or federal rules. *Degen v. United States*, 517 U.S. 820, 823 (1996) (inherent powers of courts may be controlled or overridden by statute or rule); *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (scope of "inherent power" does not include power to circumvent federal rules); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (same).

Because Rule 41(d)(2)(D) allows no discretion in the issuance of the mandate, the filing of this Court's order denying certiorari with the Clerk of the Sixth Circuit on December 8, 2004, operated, as a matter of law, to dissolve the Sixth Circuit's March 24, 2003, stay of the mandate. *See also* 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3987.1, p. 744 (3d ed. 1999) (If the Supreme Court denies certiorari, "the stay is automatically dissolved and the rule directs that the court of appeals 'must issue the mandate immediately' when a copy of a Supreme Court order denying the petition for writ of certiorari is filed"). Therefore, any further stay of the mandate or other action disturbing the finality of the court's prior decision following denial of certiorari is an extraordinary act tantamount to a decision of the court of appeals to recall the mandate. *See, e.g., Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir.) (en banc), *cert. denied*, 505 U.S. 1213 (1992) (continuing stay of mandate following denial of certiorari justified only upon the same exceptional circumstances permitting recall of the mandate); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990) (Rule 41(b)'s express direction makes threshold showing of "exceptional circumstances" necessary before mandate may be stayed after denial of certiorari); *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 982 (2005) (same). And in the federal habeas context, where a prisoner seeks relief from a criminal judgment entered by a state court, this Court has made clear that a decision to recall a mandate must be measured against the statutory and jurisprudential limits applicable in habeas cases. *Calderon*, 523 U.S. at 553. The June 2004 decision of the Sixth Circuit to withdraw its January 2003 opinion came 198 days after Rule 41(d)(2)(D) made issuance of the mandate mandatory and 152 days after the Sixth Circuit's "extension" of the

stay expired and should, therefore, be deemed the equivalent of a decision by the Sixth Circuit to recall the mandate subject to the discretionary limitations imposed by *Calderon*.

B. A federal habeas judgment becomes "final" when the court of appeals fully resolves the appeal and is subject to no further review or correction by this Court, even if the mandate of the court of appeals has not yet issued.

Although acknowledging *Calderon*'s restrictions on a court of appeals' ability to withdraw an already issued mandate, the Sixth Circuit asserted that it retained the "inherent power" to reconsider its judgment because the mandate had "not yet issued in this case." (Pet. App. 6) But issuance of the mandate, which ordinarily is nothing more than "a certified copy of the judgment, a copy of the court's opinion, if any, and any directions about costs," Fed. R. App. P. 41(a), does not have such talismanic significance. It is a purely ministerial act required by Rule 41, performed by the clerk, and it is wholly separate from an appellate court's adjudication of the merits of a case.[8] *See Finberg*, 658 F.2d at 96 n.5 ("[T]he extent of a Court's supervision of a case between entry of judgment and issuance of the mandate should not be overstated"). While issuance of the mandate may be evidence of the finality of

[8] The Third Circuit has expressly recognized the "minimal role" of a court between the filing of its decision and the issuance of a mandate. *See, e.g., Humphreys v. DEA*, 105 F.3d 112, 117 (3d Cir. 1996) (declining to vacate decision as moot due to death of party after decision was filed, but before mandate issued).

an appellate court's judgment, it is not necessary to achieve it.

Undoubtedly, a federal court of appeals retains jurisdiction over a case and, thus, the power to alter or modify the judgment prior to issuance of its mandate. *Wilson v. Ozmint*, 357 F.3d 461, 463 (4th Cir. 2004) (court may amend "what it previously decided" before issuance of the mandate); *First Gib. Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) ("[b]ecause the mandate is still within our control, we have the power to alter or to modify our judgment"); *Finberg v. Sullivan*, 658 F.2d 93, 102 (3d Cir. 1981) ("[t]his Court unquestionably may change its judgment before the mandate becomes effective"); *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir.), *cert. denied*, 439 U.S. 958 (1978) (as long as appellate court retains its mandate, it maintains its jurisdiction over the case and the power to alter the mandate); *Burget v. Robinson*, 123 F. 262, 264 (1st Cir. 1903) (effect of order staying mandate after judgment indefinitely is to retain jurisdiction of the cause in that court and the power to grant rehearing, even after the term). However, the mere existence of jurisdiction in the court of appeals does not *per se* negate the finality of its judgment. "[F]inality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." *Market St. Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

This Court has long recognized the strong finality concerns implicated when the jurisdiction of one sovereign is invoked to upset a decision of another. Indeed, this Court has described the requirement of finality as "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Given the "realm of potential conflict

between the courts of two different governments" created in that circumstance, the Court, since 1789,[9] has been constrained in its power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." *Radio Station WOW, Inc.*, 326 U.S. at 124. The current federal statute regulating the Court's jurisdiction to review state-court decisions, codified at 28 U.S.C. § 1257(a), retains that original "firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

To be reviewable by this Court, a state-court judgment must be final in two respects: (1) it must be subject to no further review or correction in any other state tribunal; and (2) it must be final as an effective determination of the litigation and not merely interlocutory. In other words, "[i]t must be the final word of a final court." *Market St. Ry. Co.*, 324 U.S. at 551. Finality for purposes of § 1257(a) is not contingent upon the issuance of an appellate court mandate. For this Court has made clear that the mere fact that residual ministerial acts are to be performed on remand to a lower court, such as "entering the judgment which the appellate court had directed," does not defeat the finality of a state-court judgment for purposes of certiorari review. *Dep't of Banking v. Pink*, 317 U.S. 264, 267 (1942); *see also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, ch. 3.5, p. 144 (8th ed. 2002) ("The literal approach [to § 1257(a)] does ascribe finality to a state court judgment that leaves only ministerial acts to be performed on remand to the lower state court"); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S.

[9] Judiciary Act of 1789, § 25, 1 Stat. 85.

62, 68 (1948) (if nothing more than mere ministerial act remains to be done, such as entry of judgment upon a mandate, decree is regarded as concluding the case and is immediately reviewable); *Cole v. Violette*, 319 U.S. 581, 582 (1943) (order of highest state court deemed "final" where it finally disposed of all issues in case, leaving nothing to be done but the ministerial act of entering judgment in the trial court); *Tower v. Fletcher*, 114 U.S. 127, 128 (1885) ("The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered").[10]

The same principles of comity and federalism driving this Court's definition of "finality" in the context of § 1257(a) also inform the definition of "finality" for purposes of retroactivity analysis. Under *Teague v. Lane*, 489 U.S. 288 (1989), judicial decisions announcing new rules of criminal procedure do not apply to cases in which the conviction becomes "final" before the new rules are announced. *Teague*, 489 U.S. at 310. Applying that analysis, this Court's decisions establish that a judgment not reviewed by this Court becomes "final" when "the time for filing a petition for a writ of certiorari has elapsed or a

[10] Nor do any of the time limits for seeking review by this Court run from the issuance of the mandate. Indeed, Sup. Ct. R. 13.3 expressly provides otherwise: "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." *See also* Sup. Ct. R. 18.1 (appeal from district court commenced by filing notice of appeal with the clerk of the district court within the time provided by law "after entry of the judgment sought to be reviewed"); 28 U.S.C. § 2101 (time for appeal runs from entry of judgment or decree).

timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).[11]

Likewise, AEDPA does not impose a mandate-based definition of finality. In fact, none of the limitations periods contained in the Act run from issuance of the mandate of the appellate court. Rather, "finality" is determined with reference to the exhaustion of available avenues of review. Under 28 U.S.C. § 2244(d)(1), a state prisoner must initiate federal habeas corpus proceedings within one year from the latest of "the date on which the judgment became final *by the conclusion of direct review* or the expiration of the time for seeking such review." (emphasis added) Under 28 U.S.C. § 2263, which provides the statute of limitations for habeas petitions filed by prisoners subject to capital sentences in states that qualify for expedited collateral review procedures, an application for habeas corpus relief under § 2254 must be filed in the appropriate district court within 180 days "after final *State court affirmance* of the conviction and sentence on direct review or the expiration of the time for seeking such review." (emphasis added) Thus, although the terms of AEDPA do not speak specifically to the question raised in this case, its provisions "certainly inform [this Court's] consideration" of it. *Calderon*, 523 U.S. at 558 (quoting *Felker v. Turpin*, 518 U.S. 651, 663 (1996)).

[11] *See also Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982) (same); *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965) (same).

Similarly, in *Clay v. United States*, 537 U.S. 522 (2003), the Court addressed finality in the context of the one-year limitation provision under 28 U.S.C. § 2255, specifically rejecting the views of two federal courts of appeals that had adopted a mandate-based definition of finality.[12] The relevant provision of the statute required the initiation of federal post-conviction proceedings within one year of "the date on which the judgment of conviction *becomes final*." 28 U.S.C. § 2255, ¶6(1) (emphasis added). The Court held that the judgment of conviction is "final" when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."[13] *Clay*, 537 U.S. at 527. The Court's ruling in *Clay* is particularly instructive here, since it involved application of the same rules of appellate procedure at issue in this case, including the mandate requirement of Fed. R.

[12] The Court expressly overruled the decisions of the Fourth and Seventh Circuits in *United States v. Torres*, 211 F.3d 836 (4th Cir. 2000), and *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998), *cert. denied*, 526 U.S. 1113 (1999), which held that the judgment of conviction for federal post-conviction purposes becomes final on the date the court of appeals issues its mandate on direct review. *See also Johnson v. United States*, 246 F.3d 655, 657 (6th Cir. 2001) ("finality" for purposes of § 2255 not delayed pending appellate resolution of post-trial motion under Fed. R. Crim. P. 33 based on new evidence).

[13] Congress has dictated this same point of finality in other contexts as well. *See, e.g.*, 26 U.S.C. § 7481(a)(2)(B) (decision of the Tax Court becomes final "[u]pon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals"); 38 U.S.C. § 7291(a)(2) (decision of the United States Court of Appeals for Veterans Claims "shall become final . . . upon the denial of a petition for certiorari, if the decision of the Court of Appeals for Veterans Claims is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit").

App. P. 41.[14] *See also United States v. Craigo*, 993 F.2d 1086 (4th Cir. 1993) (court's stay of its mandate to allow government to seek certiorari left judgment within the court's control subject to modification, even though the *judgment became final* when the government failed to file certiorari petition) (emphasis added).

As the discussion above illustrates, in determining the point of finality in the context of both direct and collateral review – state and federal – both Congress and this Court have consistently applied the same definition of finality – one that is practical, workable, and not dictated or controlled by the particular practices of the rendering courts – that the judgment at issue be "the final word of a final court." Federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *O'Neal v. McAninch*, 513 U.S. 432, 448 (1995). When a court of appeals enters a final judgment denying habeas relief and then denies rehearing of that decision, it has had its "final word," subject only to review

[14] In those limited situations in which a mandate-based definition of finality has been employed, the rationale is not based upon any general view that the mandate is necessary to achieve "real" finality. For certain determinations under the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, and the former version of Fed. R. Crim. P. 33 (motion for new trial based on newly discovered evidence), for example, some courts have held that finality attaches upon issuance of the appellate court's mandate. *Clay*, 537 U.S. at 537. But since both require further action in the district court, a mandate-based definition of finality in those contexts is entirely reasonable. Issuance of the mandate is necessary to transfer jurisdiction back to the district court to permit it to proceed either with a retrial of the defendant or disposition of a motion. As the Second Circuit reasoned in *United States v. Reyes*, 49 F.3d 63 (2d Cir. 1995), it would be anomolous to include within the pertinent time period an interval during which the lower court had no jurisdiction to act. *Reyes*, 49 F.3d at 68.

by this Court. If, as in *Teague*, *Clay* and *Caspari*, denial of certiorari is of significant enough import, in itself, to establish finality of a judgment of conviction for purposes of retroactivity and collateral review, then surely that event should carry at least as much significance in the federal habeas context, which this Court has long recognized as collateral and secondary in importance to the direct review proceedings. *See Williams v. United States*, 401 U.S. 667, 682-83 (1971); *see also Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature"). Indeed, the Tennessee Supreme Court specifically looks to that event as the point at which a death-sentenced prisoner has completed "the standard three-tier appeals process" for purposes of setting an execution date.[15] Moreover, this view is entirely consistent with the mandatory language of Rule 41(d)(2)(D), requiring the clerk of the court of appeals to issue the mandate immediately upon the filing of a copy of this Court's order denying certiorari.

[15] Tenn. Sup. Ct. R. 12.4(A) provides: "After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date. The motion shall include a brief summary of the procedural history of the case demonstrating that the prisoner has completed the standard three-tier appeals process. The motion shall be considered premature if filed prior to the expiration of the time for filing a petition for writ of certiorari or a petition to rehear the denial of a petition for writ of certiorari in the United States Supreme Court."

There is no logical justification for departing from this Court's "long-recognized, clear meaning" of finality in the post-conviction relief context, *Clay*, 537 U.S. at 527, and imposing a mandate-based definition, especially where, as in this case, the judgment of the court of appeals affirmed the summary dismissal of a habeas petition, requiring no further action in the district court save the filing of the judgment in the court below. The decision of the court of appeals lacked none of the attributes of an adjudication. All that remained to be done following this Court's denial of certiorari – issuance of the mandate by the clerk of court – is properly characterized as merely "ministerial." Thus, the fact that the court of appeals retained some "latent power" to modify its judgment while it controlled the mandate did not defer or defeat the finality of its judgment. *Market St. Ry. Co.*, 324 U.S. at 551 ("finality is not deferred by the existence of some latent power in the rendering court to reopen or revise its judgment").

Because finality of the Sixth Circuit's judgment attached when this Court denied respondent's petition for a writ of certiorari, the court's subsequent withdrawal of that judgment was an event of considerable significance and demanded an extraordinary justification, particularly given the State of Tennessee's strong interest in the finality of its criminal convictions. As we now show, the Sixth Circuit's action lacked any such justification and should be overturned by this Court.

II. THE SIXTH CIRCUIT'S DECISION TO WITHDRAW ITS FINAL JUDGMENT AND PERMIT THOMPSON TO RELITIGATE THE MERITS OF HIS UNDERLYING HABEAS CORPUS PETITION CONSTITUTES AN ABUSE OF DISCRETION.

While the courts of appeals are recognized to possess inherent power to reconsider *sua sponte* the merits of an earlier decision that has become final, the power must be exercised only in "extraordinary circumstances." *Calderon*, 523 U.S. at 549-50 (addressing *sua sponte* recall of the mandate) (citing 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)). In the context of federal habeas review of a state criminal conviction, that power is even further circumscribed by the comity concerns underlying this Court's habeas precedents. Thus, in *Calderon*, this Court held that a court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Id.* at 558. "[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." *Id.* at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). If the petitioner asserts his actual innocence of the underlying crime, "he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. . . .'" *Id.* at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, "he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.* at 559-60 (quoting *Sawyer*, 505 U.S. at 348).

Because the Sixth Circuit failed to perceive its action as the equivalent of a recall of the mandate, it made no attempt to justify its decision under either standard. It is clear, however, that the evidence on which the court based its remand – the discovery deposition of Faye E. Sultan, Ph.D. – meets neither criterion. The deposition addressed only potential mitigation evidence available to defense counsel and in no way undermined the jury's determination of Thompson's guilt. The Sixth Circuit itself viewed it as probative in analyzing Thompson's claim of ineffective assistance of counsel at sentencing, since it could have demonstrated available mitigating evidence related to his mental state at the time of the crime. Judge Suhrheinrich characterized the Sultan deposition as "powerful mitigating evidence that should have been presented to the trier of fact at sentencing."[16] (Pet. App. 86) Indeed, Dr. Sultan's opinion was specifically couched in the language of the statutory mitigating circumstance under Tenn. Code Ann. § 39-2-203(j)(8) ("The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect . . . ."):

> It is my opinion that . . . Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he was convicted and sentenced. *This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.*
>
> Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect.

[16] The panel majority specifically approved Judge Suhrheinrich's summary of the probative value of the Sultan deposition. (Pet. App. 2)

> His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. *There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.*

(J.A. 20) (emphasis added).

On its face, the potential relevance of this evidence was limited to the sentencing phase of Thompson's trial; it suggested that there might have been additional mitigating information available to defense counsel that he did not present. The Sixth Circuit was thus authorized to revisit its prior decision only if that evidence established Thompson's "innocence of the death penalty" under *Sawyer*. *Calderon*, 523 U.S. at 560 (quoting *Sawyer*, 505 U.S. at 348).[17] To prevail on such a claim, a petitioner must demonstrate "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found . . . [him] *eligible* for the death penalty under the applicable state law," *Sawyer*, 505 U.S. at 336, or, in other words, "that there was *no aggravating circumstance* or that some other condition of eligibility had not been met." *Id.* at 345 (emphasis added). That showing simply cannot be made on this record.

At the time of Thompson's offense, first-degree murder in Tennessee was punishable by death or imprisonment for

[17] *Sawyer*'s "actual innocence of the death penalty" exception is limited to "the context of an alleged error at the sentencing phase of a capital trial." *Sawyer*, 505 U.S. at 340 (quoting *Smith v. Murray*, 477 U.S. 527, 537 (1986)).

life. Tenn. Code Ann. § 39-2-202(b) (1982). Once convicted of the crime, a defendant is eligible for imposition of the death penalty if the jury finds "at least one statutory aggravating circumstance" beyond a reasonable doubt. Tenn. Code Ann. § 39-2-203(g) (1982). The jury in this case found three such aggravators: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (2) that the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution; and (3) that the murder was committed while the defendant was engaged in committing robbery or kidnapping. Tenn. Code Ann. § 39-2-203(i)(5), (6), (7) (1982) (repealed). The Sultan deposition does not undercut the applicability of any of these factors to Thompson's crime.

The "heinous, atrocious or cruel" aggravator in effect at the time of Thompson's trial was established by the circumstances of the murder itself. The proof at trial (as affirmed in the opinion of the Tennessee Supreme Court on direct appeal) demonstrated "a particularly senseless killing indicative of depravity of mind." *Thompson*, 768 S.W.2d at 252. Brenda Lane was abducted at knifepoint from the parking lot of a Wal-Mart store and driven some distance into rural Tennessee, where she was stabbed multiple times and left alive, conscious and alone to die on a winter night. *Id.* As noted in the opinion of the Tennessee Supreme Court, it is highly probable that Lane knew her fate in advance; there is evidence that she was crying as she rode with Thompson and his juvenile accomplice to her death. *Id.* Moreover, the fact that the murder was committed while Thompson was engaged in committing kidnapping and robbery – supporting application of the "felony murder" aggravator – has never been disputed.

Thompson's own statement to police established that he abducted Lane at knifepoint and took her vehicle after murdering her.[18] Finally, the Tennessee Supreme Court concluded that there was ample evidence to support the jury's determination that the murder was committed to prevent the lawful apprehension of Thompson and his juvenile accomplice. They were both on the run from authorities, and Lane undoubtedly "could have identified the twosome and raised an alarm after the theft of her car." *Id.* Because these factors remain unaffected by the evidence on which the Sixth Circuit relied to withdraw its opinion – or any other record evidence in this case – Thompson cannot satisfy *Sawyer*'s miscarriage of justice exception because he cannot demonstrate that he is ineligible for the death penalty.

Instead, as even the concurring opinion demonstrates, the Sultan deposition would be relevant only to the jury's *selection* of the appropriate penalty. Even in view of multiple aggravating circumstances, whether a defendant in fact receives a capital sentence depends upon the weighing of individual mitigation evidence against the statutory aggravator or aggravators found, *i.e.*, the selection stage. *See, e.g., Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (distinguishing between eligibility and selection phases of capital sentencing process); *Tuilaepa v. California*,

[18] Under Tennessee law at the time of Thompson's offense, "kidnapping" was committed when a person "forcibly or unlawfully confines, inveigles, or entices away another, with the intent to cause him to be secretly confined, or imprisoned against his will." Tenn. Code Ann. § 39-2-302 (1982). "Robbery" was defined as the "felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." Tenn. Code Ann. § 39-2-501 (1982).

512 U.S. 967, 972-73 (1994) (same). Thus, by its very nature, the new evidence upon which the Sixth Circuit based its decision – additional mitigation evidence – can never meet *Sawyer*'s miscarriage of justice standard. *See Sawyer*, 505 U.S. at 345 (rejecting argument that "innocence of the death penalty" should be extended beyond elements of the capital sentence to include additional mitigation evidence).

Thompson's ability to meet the less stringent *Schlup* standard fares no better. While *Schlup*'s miscarriage of justice exception is met by the lower "more likely than not" standard, this Court has explicitly tied the exception to a petitioner's "actual innocence" of the crime. Thus, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him" in light of newly discovered evidence. *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring). The evidence in support of an assertion of actual innocence should be reliable, concrete and verifiable. *Schlup*, 513 U.S. at 234. In addition, this Court has made clear that the miscarriage of justice exception under *Schlup* does not extend to "prisoners whose guilt is conceded or is plain." *Schlup*, 513 U.S. at 321 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)).

Neither the initial nor subsequent opinion of the Sixth Circuit contains any suggestion that Thompson did not kill Brenda Lane or that he is otherwise "innocent" of her murder, a result that is hardly surprising, since Thompson himself confessed to the crime and made no appreciable

effort to contest his guilt at trial.[19] *Thompson*, 768 S.W.2d at 243. It was Thompson's own statement that led authorities to Lane's body, *id.*, and as recently as January 19, 2004, Thompson accepted full responsibility for her murder, as noted in the Tennessee Supreme Court's May 2004 opinion. *Thompson*, 134 S.W.3d at 181. Indeed, according to Thompson's own mental health expert in state competency proceedings, Thompson "readily admitted that he 'killed Brenda Lane.'" (Pet. App. 373)

Aside from the overwhelming evidence of guilt at trial, the Sultan deposition itself supports Thompson's guilt, as demonstrated by the following exchange:

> Q. What did Mr. Thompson tell you about the offense, as best you can recall?
>
> A. As best I recall, Mr. Thompson talked about his relationship with the young girl that he was with for the days and weeks prior to this.
>
> Q. Joanne McNamara?
>
> A. Yes. . . . What he told me was that they were thrown out of the place that they had been staying

[19] Indeed, in closing argument, defense counsel all but admitted Thompson's guilt: "We elected, for our benefit and for your benefit, to not enter a plea of guilty and not enter a plea of not guilty. . . . If a guilty plea had been entered, you all would not have seen the step-by-step situation of what happened. . . . We didn't put on any witnesses. What else is there to say? You have seen the video tape of Mr. Thompson talking with Attorney General Charron not long after this happened. . . . I think that is the clearest evidence that could be presented. . . . I noticed in the video tape that General Charron asked him there at the Wal-Mart parking lot, 'What did you want from her?' He said, 'Nothing.' We had two desperate people that I believe only wanted a ride away from the situation that they had been unable to handle." (R. 5, Add. 1H, Vol. 16, pp. 85-86, 92)

> when it was discovered that they were not in fact married. I don't know who it was who portrayed them as a married couple to the people that they were staying with, but that the truth of it was discovered, that someone contacted Joanne McNamara's mother – or parents, I don't know which; I think mother – to let her know that this child was in her home, the person they were staying with, that Mr. Thompson forced the victim in this case into her car at knifepoint. . . . *[H]e knew that he had in fact killed her.*

(J.A. 41-42) (emphasis added).

Nor can it be argued that Thompson's new evidence meets the *Schlup* standard on the theory that it might have supported an insanity defense. First, this Court has made clear that, for purposes of the miscarriage of justice analysis under *Schlup*, "actual innocence" is different from "legal innocence." *Calderon*, 523 U.S. at 558; *see also Bousley v. United States*, 523 U.S. 614, 615 (1998) ("Actual innocence means factual innocence"). The clear example of actual innocence is "the case where the State has convicted the wrong person of the crime." *Sawyer*, 505 U.S. at 339-40. An insanity defense cannot satisfy the concept of "actual innocence," because it concedes the act, but invokes a bar to legal responsibility for it. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 76 (1992) (An insanity verdict "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense; and (ii) he committed the act because of mental illness"). This prerequisite of

guilt is incompatible with the requirement of actual innocence necessary to establish a miscarriage of justice.[20]

Second, even if potential evidence of insanity is an appropriate consideration for determining whether there has been a miscarriage of justice, the Sultan deposition fails to meet even that threshold for consideration because Dr. Sultan's testimony fails to establish the defense under Tennessee law. Consistent with the language of the statutory mitigating circumstance, Dr. Sultan specifically opined that Thompson's ability to conform his conduct to the requirements of the law was "substantially impaired" as a result of mental illness. (J.A. 20) But that mitigator, by definition, does not amount to legal insanity, since it specifically provides that the mental impairment of which it speaks is "insufficient to establish a defense to the crime." Tenn. Code Ann. § 39-2-203(j)(8) (1982). By contrast, an insanity defense under Tennessee law at the time of Thompson's crime required more than a showing of mere impairment; a defendant was required to demonstrate that he lacked the substantial *capacity* to conform his conduct to the requirements of the law. *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977). Finally, the testimony at Thompson's trial of both the defense and State mental health expert witnesses clearly established Thompson's sanity at the time of the offense. (J.A. 264-66) Dr. Sultan's testimony would thus provide nothing more than impeachment evidence in the form of an alternative opinion on the subject of Thompson's sanity. And this Court has made clear that impeachment evidence provides

[20] As this Court has stated, "the quintessential miscarriage of justice is the execution of a person who is *entirely* innocent." *Schlup*, 513 U.S. 324-25 (emphasis added).

no basis for finding a miscarriage of justice. *Calderon*, 523 U.S. at 563 (citing *Sawyer*, 505 U.S. at 348). In sum, the evidence on which the Sixth Circuit based its decision falls far short of the showing necessary to justify the extraordinary act of withdrawing an already final decision.

After the courts of the State of Tennessee affirmed Thompson's conviction and sentence on direct appeal and then refused to disturb it on state collateral review, the State waited five and one-half years for federal habeas proceedings to run their course. When the district court denied Thompson's federal habeas petition, the Sixth Circuit affirmed that decision and this Court denied both certiorari and rehearing. The courts of Tennessee then took the steps necessary to enforce Thompson's death sentence. In the period between this Court's final disposition of Thompson's request for certiorari in January 2004 and the Sixth Circuit's second decision in June 2004, the Tennessee Supreme Court set a new execution date, ordered expedited competency proceedings in the trial court, disposed of numerous procedural motions seeking to delay execution of the judgment, and issued a detailed opinion following expedited appeal proceedings affirming the trial court's denial of Thompson's claim of incompetence for execution. In short, the State marshaled the full force of its judicial machinery in what should have been the final step toward execution of its judgment. This case, like *Calderon*, illustrates the extraordinary costs associated with a federal court of appeals' reconsideration of its judgment in a habeas case after finality has attached.

The State's finality interests in this case are no different from those that *Calderon* sought to protect. Those interests are "all but paramount, without regard to whether the court of appeals predicates the recall on a

procedural misunderstanding or some other irregularity occurring prior to its decision." *Calderon*, 523 U.S. at 557. Because Thompson has already had extensive review of his claims in both state and federal courts, absent a strong showing of actual innocence, "the State's interests in finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id.* The Sixth Circuit's surprise reconsideration of its January 2003 decision frustrates the State's "all but paramount" interest in finality and constitutes a grave abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to reinstate its January 9, 2003, judgment affirming the district court's denial of habeas corpus relief.

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IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CAPITAL CASE
QUESTION PRESENTED

Does Rule 41(d)(2)(D) of the Federal Rules of Appellate Procedure require immediate issuance of a court of appeals' mandate following this Court's denial of a petition for a writ of certiorari, such that any delay in issuing the mandate is an abuse of discretion unless justified by the extraordinary circumstances warranting recall of the mandate from another court?

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STATUTES AND RULES

This case involves an interpretation of Rule 41 of the Federal Rules of Appellate Procedure, which is set forth in an appendix to this brief. App., *infra*, 1a.

STATEMENT OF THE CASE

This case concerns the power of a court of appeals to withhold issuance of its mandate following this Court's denial of a petition for a writ of certiorari. Petitioner's view is that, upon receipt of an order denying certiorari review, a court of appeals must immediately issue its mandate, such that any delay in issuing the mandate is akin to recalling a mandate from another court. That is mistaken. Nothing in Rule 41 of the Federal Rules of Appellate Procedure, this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), or this Court's analogous decisions concerning "finality" abrogates the power of a court of appeals to withhold issuance of its mandate following the denial of certiorari for reasons unrelated to this Court's decision to deny review. To the contrary, each of these sources reaffirms the centuries-old proposition that a court of appeals has wide discretion to modify or vacate its prior decisions until deciding to relinquish jurisdiction over a case. Courts of appeals may (and sometimes do) exercise that discretion.

The court of appeals' decision in this case falls well within that discretion. Exercising its power to delay issuance of the mandate pending *sua sponte* rehearing, the court retained jurisdiction over the case until reaching a final decision it determined correctly resolved the issues presented. The court of appeals spent "hundreds of hours" reviewing the record before ultimately concluding that a key piece of evidence completely undercut its prior decision and precluded summary dismissal of Thompson's capital habeas petition. Far from an abuse of discretion, the decision below is a textbook and laudable basis for reconsideration.

1. On January 2, 1985, a few hours after being arrested, Gregory Thompson ("Thompson" or "Respondent") confessed to abducting and murdering Brenda Lane ("Lane") the day before. Pet. App. 120. After Thompson directed a search team to Lane's body the following day, a pathologist concluded that Lane died from multiple stab wounds to the back, but found no evidence of other trauma. *Id.* The State charged Thompson with capital first-degree murder.

Thompson's court-appointed trial counsel were aware of evidence suggesting Thompson was suffering from severe mental illness at the time of the crime. Prior to trial, counsel filed a notice that they would raise an insanity defense and also filed a motion seeking psychological and neurological evaluations to determine Thompson's competency. Following testing by the State, trial counsel requested court funds for an independent psychiatric evaluation and, on July 29, 1985, the trial court granted that request. Pet. App. 122-23; *cf. Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (due process requires state in capital cases to offer funding for psychiatric evaluation where defendant's sanity is at issue; "in such cases[ ] a defense may be devastated by the absence of a psychiatric examination and testimony").

Despite having requested and received court funds, trial counsel failed to retain an expert qualified to render a professional opinion about Thompson's mental health at the time of the crime. Pet. App. 128, 181. Trial counsel later explained that the psychiatrist they "ordinarily" used had moved out of the state. *Id.* at 181. Instead, trial counsel used the court-provided funds to pay for the services of Dr. George Copple, an "industrial psychologist" with a prior expertise in evaluating social security applicants' vocational abilities, and whom trial counsel had engaged, for the separate purpose of assessing "what kinds of things [Thompson] might be capable of doing in a prison situation," Pet. App. 123 n.4, *prior* to requesting funds for the psychiatric examination they argued was "need[ed]" to determine Thompson's

mental health. *Id.* at 122-123, 181-188. *Cf. Wiggins v. Smith*, 539 U.S. 510, 525 (2003) (finding investigation unreasonable "in light of what counsel actually discovered").

At trial, trial counsel conceded guilt, called no witnesses, and presented no proof. *Id.* at 123. On August 17, 1985, the jury found Thompson guilty of first-degree murder.

At sentencing, having failed to investigate the subject, trial counsel abandoned any affirmative effort to show that Thompson's mental state was a mitigating factor against imposition of the death penalty. Instead, trial counsel argued that, despite the gravity of the offense, Thompson had been a "non-violent, cooperative, and responsible" person who had the potential to be a productive prisoner.[1] To that end, Dr. Copple testified about Thompson's capacity for employment in prison. *Id.* at 123, 187-189. On September 4, 1985, after hearing no rebuttal to the State expert's conclusion that Thompson was not mentally ill at the time of the crime,[2] the jury imposed the death penalty, and the trial court sentenced Thompson to death. *Id.* at 127-30.

On February 27, 1989, the Tennessee Supreme Court affirmed the judgment and, on June 28, 1990, this Court denied certiorari. 497 U.S. 1031 (1990).

Thompson next sought state post-conviction relief, contending, *inter alia*, that trial counsel failed to "investigate adequately" his background and mental health condition. Pet. App. 13. The trial court denied Thompson's request,

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[1] Despite their uninformed and unreasonable decision, trial counsel nevertheless elicited testimony about Thompson's bizarre and "paranoid" behavior. Pet. App. 124, 263. That behavior, trial counsel were aware, surfaced following an incident during Thompson's military service in which he was attacked by three fellow service members with a crow bar, suffering a severe head injury. *Id.* at 124.

[2] Indeed, despite having failed to conduct the tests necessary to reach any opinion about Thompson's mental health, Copple conceded during cross-examination that it was his opinion that Thompson was *not* suffering from mental illness at that time. Pet. App. 127.

filed by his new counsel, for funds to conduct a full psychiatric and neurological examination and, after a hearing, denied Thompson relief. Pet. App. 138. On May 30, 1997, the Tennessee Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief. On October 20, 1997, the Tennessee Supreme Court denied Thompson's application for permission to appeal. *Id.* at 142.

2. On January 29, 1998, Federal Defender Service of Eastern Tennessee, Inc. ("habeas counsel") was appointed to represent Thompson in federal habeas proceedings. Pet. App. 16-17. On June 12, 1998, Thompson filed his federal petition in the United States District Court for the Eastern District of Tennessee, asserting, *inter alia*, ineffective assistance of counsel claims. The petition alleged that trial counsel failed to reasonably investigate Thompson's mental health, uncover and present readily available evidence of mental illness, and also failed, despite receiving court funds, to retain an expert qualified to diagnose his mental health at the time of the crime. *Id.* at 17-18, 143 n.12.

On February 17, 2000, acting on petitioner's motion, the district court summarily dismissed Thompson's claims on the grounds that he had not "provided this Court with *any* significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." Pet. App. 270 (emphasis added). The district court stayed the execution "pending any appeal." J.A. 89.

3. On April 21, 2000, Thompson appealed the district court's summary dismissal order to the United States Court of Appeals for the Sixth Circuit.

a. On March 2, 2001, while the case was being briefed before the court of appeals, Thompson filed a motion in the district court for relief from the judgment, and urged the court to enter an order supplementing the record with the expert report and the State's deposition of Dr. Faye E. Sultan,

Ph.D. Pet. App. 337. Thompson argued that the grounds for the district court's summary dismissal – that Thompson had failed to produce any significant evidence of mental illness at the time of trial – was contrary to the report and deposition testimony of Dr. Sultan, a clinical psychologist retained by habeas counsel who had worked on approximately 75 capital cases. Pet. App. 338. Following formal psychological testing on Thompson, as well as clinical interviews of Thompson, his family, and friends, Dr. Sultan concluded that "Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life," and that "Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced." *Id.* at 19-20. Dr. Sultan concluded that Thompson was suffering from Schizoaffective Disorder, Bipolar Type at the time of the offense – rendering Thompson "unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur – lots of different kinds of delusions actually – auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination." *Id.* at 20, 76-77. Thompson's mental illness was severe at the time of the offense, and it has deteriorated even more during his incarceration. *Id.* at 20, 37-63.

The State was aware of Dr. Sultan's conclusions, having deposed her and having received a copy of her report. Habeas counsel had also identified Dr. Sultan as an expert witness in Thompson's pretrial witness list, and stated that Dr. Sultan was expected to testify that "it is her expert opinion that [Thompson] suffers from schizophrenia and did so at the

time of the offense and at the time of trial," and that Thompson's "mental illness was severe." Pet. App. 28.[3]

Habeas counsel argued that Dr. Sultan's report and deposition testimony created a disputed question of fact precluding summary dismissal of the claim, but, due to "excusable neglect," were not included in the record.[4] Pet. App. 340. On March 7, 2001, the district court, without reaching the merits of Dr. Sultan's report and testimony, denied the motion for relief from the judgment as out of time. *Id.* at 344.

After filing the motion for relief from the judgment, but prior to its resolution, Thompson also filed in the court of appeals a motion to hold the appeal in abeyance pending resolution of the motion before the district court. Pet. App. 333. To demonstrate that the merits of the motion before the district court warranted an abeyance, habeas counsel attached to the abeyance motion a copy of Dr. Sultan's report and deposition. *Id.* at 334; J.A. 10-87. On March 21, 2001, after being informed by the State that the district court had resolved the underlying motion, the court of appeals denied Thompson's motion to hold the appeal in abeyance. Pet. App. 345. The court of appeals did not address the merits of the question of whether Dr. Sultan's report created a disputed fact precluding dismissal of the petition. *Id.*

b. On March 14, 2001, also while Thompson's appeal was pending before the court of appeals, the State petitioned the Chancery Court for the State of Tennessee for the appointment of a conservator for Thompson to provide consent for medical and psychiatric treatment, including the forcible administration of medication if necessary. BIO App. 25. In support of that petition, the State argued that Thompson was

[3] Dr. Sultan's inclusion on the initial witness list and anticipated testimony was further raised in Thompson's briefing before the court of appeals. *See* Final Reply Brief of Appellant, Gregory Thompson at 18.

[4] Habeas counsel mistakenly believed that the State had previously placed the report and deposition testimony in the record. Pet. App. 340.

suffering from a longstanding and severe mental illness, and that he was "in need of protection and assistance by reason of the illness." *Id.*; J.A. 57. On April 30, 2001, the Chancery Court granted the State's petition.

Thompson's habeas counsel made an appearance in Chancery Court, challenging the State's appointment of a conservator and seeking to obtain Thompson's medical records from the prison. The State challenged that appearance, arguing that "the Federal Defender is limited to appearances in Federal Court in the Eastern District unless there is a Federal Court order permitting the office to appear in state court on a certain matter." Mot. to Preclude Appearance at 6. Habeas counsel requested that the court of appeals issue an order authorizing them to represent Thompson in state proceedings, which the court of appeals granted. BIO App. 229.

4. On January 9, 2003, the court of appeals, in a 2-1 panel decision, affirmed the district court's summary dismissal of the petition, finding, like the district court (but contrary to Dr. Sultan's report), that Thompson "has never submitted to *any* court *any* proof that he suffered from severe mental illness at the time of the crime." Pet. App. 159 (emphasis added). Although the court briefly noted Dr. Sultan's involvement in the case, *see id.* at 156, it did not address the merits of her conclusions.[5] Judge Moore noted in concurring that, "[w]hile I have sympathy for the view expounded in the dissent regarding the general propriety of using industrial psychologists as expert witnesses in capital cases, I cannot conclude that Thompson's trial counsel was constitutionally

[5] As noted above, the State was aware of Dr. Sultan's report and testimony. In its Reply Brief, however, the State argued that "[w]ith regard to [Thompson's] claim of ineffective assistance of counsel, despite the benefit of discovery in federal habeas proceedings and federal funding for mental health experts, Thompson presented no proof of his mental state at the time of the offense or at trial to support his contention that trial counsel was ineffective in failing to present proof regarding his mental state." Final Brief of Respondent-Appellee at 40.

ineffective in hiring Dr. Copple in this case because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." *Id.* at 171.

Judge Clay dissented. He concluded that, under this Court's holding in *Williams v. Taylor*, 529 U.S. 362 (2000), the State court's decision rejecting Thompson's ineffective assistance of counsel claims was an "unreasonable application" of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 172. *See also* 28 U.S.C. § 2254. Judge Clay concluded that trial counsel's failure to conduct a reasonable investigation into Thompson's mental health background, and failure to hire a qualified clinical psychologist or psychiatrist, resulted in a failure "to present any legitimate mitigating evidence at the penalty phase of the trial." Pet. App. 178-79. As a result, Judge Clay found that "there can be no confidence in the reliability of the state court's death sentence." *Id.* Finding that trial counsel's "baffling," "incomprehensible," and "completely indefensible" conduct "was not merely ineffectual, but positively detrimental" to Thompson's defense, Judge Clay would have vacated the district court's order and granted relief. *Id.* at 192, 200-01.

5. Thompson's timely filing of a petition for panel rehearing prevented issuance of the mandate. *See* Fed. R. App. P. 41(d)(1). In that petition, Thompson argued, *inter alia*, that Dr. Sultan's report and deposition testimony created a factual dispute concerning his mental health at the time of the offense which precluded summary dismissal of his petition. Pet. for Rehearing at 30. On March 10, 2003, the court of appeals denied the petition for rehearing. Pet. App. 346.

On March 13, 2003, Thompson timely moved to stay the mandate pending his petition for writ of certiorari and, on March 24, 2003, the court of appeals granted that motion. Pet. App. 347. On April 3, 2003, the court of appeals returned the case record to the district court. J.A. 7.

On August 19, 2003, while the stay of the mandate was in effect, more than seven months after the initial decision of the court of appeals and more than a year after it issued an order expanding habeas counsel's appointment to include state court proceedings, the State filed a motion requesting reconsideration of the appointment order. BIO App. 224.

On September 19, 2003, the court of appeals recalled the case record from the district court, which was recorded on the public docket sheet. J.A. 7-8.

On December 1, 2003, this Court denied Thompson's petition for a writ of certiorari. J.A. 91. The following day, Thompson moved the court of appeals to continue its stay of the mandate pending this Court's ruling on Thompson's petition for rehearing. Although a copy of this Court's "order denying the petition for a writ of certiorari," Fed. R. App. P. 41(d)(2)(D), was filed in the court of appeals on December 8, 2003, the State did not contest the authority of the court of appeals to continue the stay. On December 12, 2003, the court of appeals granted Thompson's stay request. Pet. App. 348. *See* Fed. R. App. P. 41(d)(1) (providing for stay of the mandate upon motion). On January 20, 2004, this Court denied Thompson's petition for rehearing. J.A. 92. On January 23, 2004, this Court's order denying rehearing was filed in the court of appeals. J.A. 8.

Although a federal court stay was in effect until the appeal was final, the State's motion for reconsideration of the court of appeals' appointment order – which was immediately relevant in subsequent state court proceedings – was still pending, the mandate had been stayed twice by court order, and the court of appeals had called for the record while the certiorari petition was pending, the State neither inquired about the mandate nor filed a motion for its issuance. Instead, on January 21, 2004, two days *before* this Court's order denying the petition for rehearing was filed in the court of appeals, the State filed a motion before the Tennessee Supreme Court requesting an execution date. BIO

App. 219. The State failed to mention that the court of appeals had not issued the mandate, representing that "Thompson has completed the standard three-tier appeals process, making the setting of an execution date appropriate." *Id.* at 220. On February 25, 2004, the Tennessee Supreme Court set Thompson's execution date for August 19, 2004.[6]

6. On June 23, 2004, the court of appeals issued a 3-0 panel decision vacating its prior decision to affirm the district court's order summarily dismissing respondent's habeas petition. Pet. App. 1-116. Invoking its "inherent power to reconsider [its] decision prior to the issuance of the mandate," Pet. App. 6, and having spent "hundreds of hours" engaging in *sua sponte* reconsideration of the case, the court of appeals concluded that it, like the district court, had erred in concluding that there was *no* factual dispute concerning whether Thompson suffered from a mental illness at the time of the offense. *Id.* at 8, 81. Specifically, the court concluded, the report and deposition testimony of Dr. Sultan, which it was now exercising its power to consider, created a factual dispute precluding summary dismissal of the petition. *Id.* at 2. The Court found Dr. Sultan's report, which concluded, *inter alia*, that Thompson's "mental illness would have substantially impaired [his] ability to conform his conduct to the requirements of the law" to be "so probative of Thompson's mental state at the time of the crime" that sum-

[6] The Tennessee Supreme Court also remanded the case to the state trial court for a determination of Thompson's competency to be executed. Pet. App. 350. Thompson thereafter submitted affidavits from three mental health professionals concluding that Thompson was incompetent to be executed. The trial court dismissed the case without a hearing, and the Tennessee Supreme Court affirmed. *Thompson v. Tenn.*, 134 S.W.3d 168 (Tenn. 2004). On June 14, 2004, Thompson filed in federal district court a motion for stay of execution and a petition for writ of habeas corpus raising a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). On June 21, 2004, the district court entered a stay of execution pending a decision on the petition. That stay remains in effect.

mary dismissal was improper. Pet. App. 5, 63. The court of appeals also stayed the execution for 180 days. J.A. 8.

The State did not seek panel rehearing. Nor did the State seek *en banc* review. Instead, 113 days after the court of appeals' decision, the State filed a petition for a writ of certiorari before this Court. On January 7, 2005, this Court granted the petition limited to Question Two. J.A. 93. The Court denied certiorari of Question One, which sought review of the decision under 28 U.S.C. § 2244(b), and Question Three, which claimed that the court of appeals' decision to remand for an evidentiary hearing was inconsistent with *Williams v. Taylor*, 529 U.S. 420 (2000).

SUMMARY OF THE ARGUMENT

This case shows why a court of appeals has the authority and discretion to delay issuing its mandate following the denial of certiorari by this Court. Prior to this Court's resolution of the certiorari petition, the court of appeals called for the record, and then spent hundreds of hours reviewing the case before concluding that its prior decision was in error. The court concluded that a critical fact precluded summary dismissal of Thompson's federal habeas petition. After deciding to delay issuance of the mandate for reasons unrelated to this Court's denial of certiorari, the court of appeals had the authority to modify its discretion while retaining jurisdiction over the case. The court of appeals' decision to exercise that authority in this case was well within its discretion.

I. Petitioner asserts that Rule 41(d)(2)(D) of the Federal Rules of Appellate Procedure precludes a court of appeals from delaying issuance of its mandate for any reason following the denial of certiorari. It does nothing of the sort. Rather, it provides that, *if* the court of appeals has stayed issuance of the mandate for the reason that this Court may grant certiorari, then the clerk of a court of appeals must, upon receipt of the denial of certiorari, issue the mandate. It does not forbid a court of appeals from extending a stay pre-

viously entered for *other* reasons. Nor does it forbid a court of appeals for withholding issuance of the mandate for other reasons. To the contrary, Rules 41(b) and (d)(1) grant a court of appeals the discretion to stay and withhold issuance of its mandate. There are all kinds of reasons a court of appeals may on occasion delay issuing the mandate following the denial of certiorari. Those reasons are often wholly unrelated to (and unaffected by) this Court's decision to deny review. At the same time, the power to delay issuing their mandates is critical to permit courts of appeals to correct clear errors and preserve their reconsideration processes.

Petitioner's proposed interpretation is also contrary to the language and history of Rule 41(c). Under petitioner's view, a mandate is "effective" on the date the court of appeals receives the denial of certiorari, regardless of whether the mandate actually issued on that date. But Rule 41(c) flatly states that the mandate is effective *only* when it actually issues. The Advisory Committee specifically rejected efforts, like petitioner's, to make the mandate effective on the date it "should" have issued. In so doing, the Advisory Committee expressly noted that a court "may delay issuance of the mandate." That interpretation is entitled to weight.

Petitioner's reading of Rule 41(d)(2)(D), in any event, cannot come close to sustaining petitioner's burden of establishing that Rule 41 was intended to displace the centuries-old authority of courts to control their mandates. Long before the Founding, English courts of law and equity had considerable power to modify their decisions after issuing them. This Court adopted the "End of Term" Rule to account for the merger of law and equity. When Congress abolished that Rule in 1948, it left the courts with untrammeled power to determine when to relinquish jurisdiction over a case. Rule 41 does not displace that untrammeled power with a straightjacket following the denial of certiorari review.

II. Petitioner also contends that, because courts of appeal lack authority to delay issuing their mandates following

the denial of certiorari, *any* delay, for *any* reason, is akin to a decision recalling a mandate from another court. In support of that contention, petitioner relies upon this Court's decision in *Calderon*. But this Court in *Calderon* consistently identified issuance of a mandate denying habeas relief as the moment at which a habeas appeal becomes final, and *expressly* rejected the State's argument that the denial of certiorari review was instead that critical moment. Here, the court of appeals never issued the mandate and, accordingly, the original decision of the court of appeals never became effective. Petitioner's argument is little more than an attempt to relitigate *Calderon*. The related "contexts" petitioner identifies addressing "finality" simply cement the conclusion that a federal habeas appeal is not final until the court of appeals issues a mandate denying habeas relief.

III. Petitioner has no fallback position to his argument that *Calderon*'s "miscarriage of justice" standard applies in this case. If this Court determines that the *Calderon* standard does not apply, it should affirm the judgment. Indeed, even if this Court concludes that *Calderon* applies, it should remand the case to the court of appeals for a determination whether the exception for a stay pending reconsideration, or the exception for "fraud on the court," has been met in this case. This Court need not, and should not, reach those questions in the first instance.

ARGUMENT

I. A COURT OF APPEALS HAS DISCRETIONARY AUTHORITY TO WITHHOLD ISSUANCE OF THE MANDATE AFTER THIS COURT DENIES CERTIORARI.

Petitioner contends that a court of appeals has no authority or discretion to delay issuance of its mandate for any reason following this Court's denial of certiorari review. That limitation, petitioner says, is required by Rule 41(d)(2)(D). Petitioner is incorrect. Rule 41(d)(2)(D) is limited to cases

in which the mandate has been stayed for the reason that this Court may grant certiorari. It is not a categorical command. Courts of appeals may stay or withhold issuance of the mandate for *other* reasons, as other sections of Rule 41 make clear. Moreover, the Advisory Committee has expressly rejected petitioner's reading of the Rule. Finally, to the extent there is doubt, it should be resolved against petitioner. Courts of appeals have for centuries had considerable control over their mandates, and that control was untrammeled when Rule 41 was adopted. Petitioner's interpretation falls far short of demonstrating an affirmative intent to displace that power entirely following the denial of certiorari. The fact that petitioner reads Rule 41(d)(2)(D) as a *de facto* jurisdictional bar only makes that problem even more obvious.

A. Petitioner's Interpretation of Rule 41(d)(2)(D) is Contrary to the Text, Overall Structure, and History of Rule 41.

1. Petitioner's interpretation of Rule 41 relies exclusively upon Rule 41(d)(2)(D), which states that, if a mandate has been stayed pending a petition for certiorari, "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D).[7] The Rule

[7] Although petitioner errs in asserting that, because issuance of the mandate is a "ministerial" act performed by the clerk, it is an unimportant *event*, Rule 41(d)(2)(D) does instruct the clerk to perform a "ministerial" function. Issuing the mandate is the responsibility of "the clerk, not the judges." *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988); *id.* ("[T]he duty to issue the mandate is . . . a responsibility of the clerk."); *cf. Commissioner v. Estate of Bedford*, 325 U.S. 283, 286 (1945) (noting that a judgment "is an act of the court," "even though a clerk does all of the ministerial acts, as here, in conformity with his court's standing instructions") (internal quotations omitted). A clerk is capable of issuing the mandate absent judicial supervision. Unless otherwise ordered by the court of appeals, a mandate consists of "a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs." Fed. R. App. P. 41(a). Rule 41(d)(2)(D) thus instructs the clerk that, unless

is by its terms limited to cases in which the reason a court of appeals has stayed issuance of the mandate is to await resolution of a petition for certiorari by this Court. By contrast, there is nothing in Rule 41(d)(2)(D) addressing cases in which the court of appeals has either stayed or withheld issuance of the mandate for reasons unrelated to this Court's resolution of a petition for certiorari. *See, e.g., First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) (court of appeals may delay issuance of the mandate following denial of certiorari); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (same). Other sections of Rule 41 grant a court of appeals the authority to determine both the appropriate length of a stay entered pending panel or *en banc* rehearing and the appropriate time to issue its mandate.

In the first place, Rule 41(d)(1) separately sets forth a court of appeals' authority to stay issuance of its mandate pending panel or *en banc* review. *See* Fed. R. App. P. 41(d)(1). If a court of appeals decides to grant rehearing, or rehearing *en banc*, Rule 41(d)(1) permits the court to stay the mandate until resolving the matter, "unless the court orders otherwise." *Id.*[8] Thus, far from being foreclosed from resolving a petition for rehearing or rehearing *en banc* following the denial of certiorari review, a court of appeals is affirmatively empowered both to resolve that petition and to make the ultimate determination *when* any stay entered dis-

the court has ordered otherwise, he or she must issue the mandate upon the filing of an order denying certiorari by this Court. In particular, it instructs that the clerk need not, before issuing the mandate, await (1) this Court's resolution of a petition for rehearing, (2) an order of the court of appeals for issuance of the mandate, or (3) a motion by a party for issuance of the mandate.

[8] Petitioner's reading of Rule 41(d)(2)(D) would also require the meaning of Rule 41(d)(1) to vary depending upon whether a petition for a writ of certiorari were filed in a case. Under petitioner's view, a court of appeals would have broad discretion to issue stays pending rehearing under Rule 41(d)(1) – but that discretion would vanish once a litigant chose to file a certiorari petition.

solves. *See* Fed. R. App. P. 41, 1998 adv. com. note (noting that the amendment to Rule 41(d) "does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari," and that the "granting of a stay and the length of the stay *remain within the discretion of* the court of appeals") (emphasis added).

The Fifth Circuit came to precisely this conclusion in *First Gibraltar Bank*, where it directly confronted an argument that Rule 41(d)(2)(D) made issuance of the mandate required "as soon as the Supreme Court denied certiorari." 42 F.3d at 897. The court rejected that argument, holding that it had "stayed the mandate in this case for two independent reasons: first, to permit an en banc poll … and second, to allow the state to petition for certiorari …. [B]ecause our stay was in effect (for a reason independent of the petition for certiorari) prior to the receipt of the order, we retain *discretionary control* over our mandate." *Id.* at 898 (emphasis added); *Alphin*, 552 F.2d at 1035 (finding that Rule 41 did not require issuance of mandate upon denial of certiorari when stay on independent grounds had been previously entered).

Even more fundamental is that Rule 41(d)(2)(D) does not remove a court of appeals' authority to determine when to *issue* the mandate. Although petitioner fails to mention it, the ultimate question in this case – when a court of appeals is required to issue a mandate – is actually set forth in Rule 41(b). And Rule 41(b) makes clear that the critical decision of when to issue the mandate is within the discretion of the court of appeals. Although it, like Rule 41(d)(2)(D), instructs a clerk when it "must" issue the mandate, Rule 41(b) also grants "[t]he court" the power to "shorten or extend the time." Fed. R. App. P. 41(b).

Accordingly, if, as here, a court of appeals decides under Rule 41(b) to withhold issuance of its mandate for reasons having nothing to do with the disposition of a petition for a

writ of certiorari before this Court, there is nothing in Rule 41(d)(2)(D) that strips the court of that power. *See, e.g., Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979) (holding that, despite mandatory language of Rule 41, "we do not think a failure to perform that duty punctually would deprive the court of jurisdiction" because "[t]he rule grants us power to shorten or enlarge the specified period by order"); *United States v. Black*, 733 F.2d 349, 351 (4th Cir. 1984) (finding that Fed. R. App. P. 41 did not limit inherent power to stay mandate).

There are all kinds of reasons why, apart from this Court's resolution of a certiorari petition, a court of appeals may sometimes choose to delay issuance of the mandate. New evidence may surface that requires reconsideration of the prior decision. *See, e.g., Hemstreet v. Greiner*, 378 F.3d 265, 269 (2d Cir. 2004) (reconsidering, *sua sponte*, and vacating prior affirmance of district court's judgment granting habeas petition, and remanding to the district court for consideration of new evidence). The court of appeals may discover a clerical error in its earlier decision that alters the opinion's meaning. The governing law may change, *requiring* the federal court to examine the case in light of the new law. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 236-37 (1944) (vacating decision of court of appeals for failing to consider a new state court opinion handed down after the time for rehearing expired but before the court of appeals issued its mandate); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) ("Until such time as the case is no longer *sub judice*, the duty rests upon federal courts to apply state law … in accordance with the then controlling decision of the highest state court."). A related question may come before the court of appeals or this Court, and the court may choose to hold the case pending resolution of that question. *See, e.g., United States v. Barela*, 571 F.2d 1108, 1111 (9th Cir. 1978) (Ferguson, J., dissenting) (observing that court stayed issuance of mandate while cases involving ret-

roactivity of prior Supreme Court decision were pending). The parties may initiate litigation collateral to the merits that the court concludes should be resolved at the same time as the underlying case. *See, e.g., Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984) (concluding that a court of appeals may "delay" issuing a mandate "until the court determines whether to grant, deny, or remand to the district court the movant's request for attorney's fees"). Or the court may simply decide that it needs more time to reach the right result. *See, e.g., Muntaqim v. Coombe*, 396 F.3d 95, 95-96 (2d Cir. 2004).

Although reconsideration of a prior decision is typically resolved before this Court's resolution of a certiorari petition, that is not always the case. Courts of appeals sometimes exercise their authority to withhold issuance of their mandates, and reexamine a prior judgment *after* this Court has denied certiorari review. *See, e.g., Muntaqim*, 396 F.3d at 95-96 (rehearing case *en banc* after denial of petition for writ of certiorari); *Marathon Oil Co. v. A.G. Ruhrgas*, 129 F.3d 746 (5th Cir. 1997) (deciding *sua sponte* to rehear matter *en banc* after this Court's denial of petition for writ of certiorari); *Fairchild v. Norris*, 51 F.3d 129 (8th Cir. 1995) (rehearing and vacating prior decision after this Court denied certiorari because the mandate had not issued); *First Gibraltar Bank*, 42 F.3d at 896-98 (staying issuance of mandate, rehearing, and vacating prior decision after this Court denied certiorari due to change in controlling law); *Alphin*, 552 F.2d at 1034-1036 (staying issuance of mandate, rehearing, and reversing prior decision in part because of change in the relevant law). In none of these cases has a court of appeals held that its authority to withhold issuance of the mandate was eliminated by this Court's denial of certiorari review.[9]

[9] Six years prior to *Calderon*, and in contrast to the decisions of the Fourth, Fifth, and Sixth Circuits, the Ninth Circuit concluded that "[a]ny stay of mandate [after the denial of certiorari] would have to be justified upon the same grounds as would justify a recall of mandate." *Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir. 1992).

Indeed, this Court's decision to deny a petition for a writ of certiorari will often have little – if anything – to do with the court of appeals' decision to reconsider the matter. Petitioner fails to identify any reason – other than his reading of Rule 41 – why this Court's decision to deny certiorari review curtails the power of a court of appeals. Nor is there any such reason. The denial of certiorari review is simply not a final decision on the merits. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting the denial of certiorari) ("Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."); *see also Foster v. Florida*, 537 U.S. 990, 990 (2002) (Stevens, J., concurring in denial of certiorari) ("I think it appropriate once again to emphasize that the denial of a petition for a writ of certiorari does not constitute a ruling on the merits."). For that reason, a decision by the court of appeals the day after this Court denies certiorari review that equity demands modification of a prior decision is no more an abuse of the court's authority than the same decision the day before this Court denies certiorari.

Other Federal Rules of Appellate Procedure also vest in the courts of appeals the power to exercise broad control over the disposition of their cases. A court of appeals may grant a petition for rehearing *en banc* out of time, *see Young v. Harper*, 520 U.S. 143, 147 n.1 (1997); Fed. R. App. P. 40(a)(1); Fed. R. App. P. 35(c), or may *sua sponte* decide to grant panel rehearing or *en banc* rehearing, *see* 1967 Adoption, Fed. R. App. P. 35 (noting that the time limits in Rule 35 "[do] not affect the power of a court of appeals to initiate in banc hearings *sua sponte*"). The critical point is that, unless it has already issued its mandate, a court of appeals may initiate reconsideration procedures at any time. This

Court has held that if "no mandate" has "issued," a court of appeals' decision is "subject to further action on rehearing." *Forman v. United States*, 361 U.S. 416, 426 (1960); *see also* Charles Alan Wright et al., 16A *Federal Practice & Procedure* § 3986 (3d ed. 1999) ("A court of appeals has the power to entertain successive petitions for rehearing and those that are filed after the expiration of the specified period and any extension thereof, but the court can grant rehearing only while it still has jurisdiction of the case and its jurisdiction ends when the mandate issues.").

2. Petitioner's reading of Rule 41(d)(2)(D) takes no account of Rules 41(b) and (d)(1), and is thus contrary to the principle that statutes (and, by implication, rules) should be interpreted holistically, in a manner that makes each section part of a harmonious whole. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citation omitted). Petitioner also seeks to convert Rule 41(d)(2)(D) into a kind of catch-all provision – an overarching Rule 41(e) – marking the end of a court of appeals' authority to stay or withhold issuance of the mandate for any reason. That violates the equally well-settled rule of construction that language of a subsection should be read in the context of that subsection, and should not extend to override the provisions of *other* subsections. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994).[10]

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[10] Petitioner's only answer is that "unlike subsection (b), there is no provision under sub-section (d)(2)(D) authorizing a delay in the issuance of the mandate following the denial of certiorari." Pet. Br. 22. That is no answer at all. The reason there is no additional Rule 41(b) principle embedded in Rule 41(d)(2)(D) is because Rule 41(b) itself completely resolves the question.

3. Aside from lacking any support in the text or history of the Rule, petitioner's attempt to read a court's discretion under Rules 41(b) and (d)(1) out of existence would have adverse consequences that are contrary to longstanding appellate practice. And, because petitioner's argument rests on a construction of Rule 41, a rule of general application, those consequences would not be confined to habeas cases.

Under petitioner's view, courts of appeals would lack their traditional authority to reconsider cases in which a litigant, as petitioner here, bypasses rehearing and rehearing *en banc* procedures by appealing immediately to this Court. Such a reading would provide courts of appeals with the perverse incentive to rush to beat the certiorari petition clock to vacate a previously-issued decision. The ability of courts of appeals to correct errors – a vital function this Court cannot be expected to perform – would suffer dramatically and needlessly as a result of petitioner's interpretation of the Rule.[11] Petitioner's view would similarly undermine the courts of appeals' ability to police themselves, and interfere with their governing processes for reconsidering previously-issued decisions.[12]

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[11] "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." Robert L. Stern, et al., *Supreme Court Practice* Ch. 4.17, at 255-57 (8th ed. 2002) (collecting statements to this effect by individual Justices and the Court, and noting Supreme Court Rule 10). Accordingly, that function falls principally on the courts of appeals. *See Calderon*, 523 U.S. at 569 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (noting that the courts of appeals' rehearing processes are vital to review panel decisions, as it is "axiomatic that this Court cannot devote itself to error correction"); *see also Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 259-60, 270-71 (1953) (noting the importance of en banc review in correcting errors).

[12] The Federal Rules of Appellate Procedure recognize the control appellate courts possess over reconsideration. Rule 40 establishes that a peti-

By contrast, reading Rule 41(b) and (d)(1) to permit a court of appeals to decide when to issue the mandate, even following the denial of certiorari, would have the salutary effect of ensuring that the courts of appeals can continue to correct their own errors and operate their own rehearing and *en banc* processes without regard to the certiorari clock. This Court should decline petitioner's invitation to turn a generally-applicable procedural rule into one that would significantly alter the rehearing practices of the circuits.

4. Petitioner's view is also incompatible with the language and history of Rule 41(c), which provides that the "mandate is effective when issued." Fed. R. App. P. 41(c). Petitioner's view is that, when a court of appeals receives an order from this Court denying certiorari, the court of appeals "must immediately" issue the mandate under any circumstance, and that any delay in issuing the mandate is beyond the court's authority. The necessary consequence of that reading is that the mandate of a court of appeals is effective when it *should have* issued under Rule 41(d)(2)(D). That is directly contrary to the language of Rule 41(c), which makes the mandate effective, not when it "should" issue, but when it does issue.

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tion for panel rehearing must be filed within 14 days of the entry of judgment, "[u]nless the time is shortened or extended by order or local rule." Fed. R. App. P. 40(a)(1); *see also* Fed. R. App. P. 35(c) (same for *en banc* petitions). The Rules do not place any limitation on when a court may *sua sponte* seek rehearing *en banc*. *See* 1967 Adoption, Fed. R. App. P. 35 (noting that the rule "does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*"). This is significant because, although courts of appeals exercise their rehearing power sparingly, *see* Douglas M. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 Geo. Wash. L. Rev. 259, 263 (2002), "most en banc hearings result from actions by the court's own judges, that is, from sua sponte en banc calls," Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Banc*, 33 McGeorge L. Rev. 17, 19 (2002).

If there were any doubt, the history of Rule 41(c) eliminates it. Prior to Rule 41(c)'s formal adoption in 1998, the Department of Justice had previously proposed that, because "there is often a delay in issuing the mandate ... the rule [should] provide that the mandate is effective on the date that the *clerk* should issue it, in accordance with the rules, even if it is not issued, on that date because of clerical delay." Minutes of the Mtg. on the Adv. Com. on Appellate Rules, Judicial Conf. of the United States, 1994 WL 880349, at *14 (Oct. 25, 1994) (emphasis added). The Advisory Committee rejected that proposal, noting:

> The mandate should be effective when issued, not when it should issue. *A judge may delay issuance of the mandate*. If a mandate is not issued on the date established by the rules and the approach advocated by the Department of Justice were accepted, one would have to determine whether the delay was the result of *clerical delay or judicial intervention.*

Id. (emphasis added).

The Advisory Committee thus made clear its conclusion that – contrary to petitioner's view – a mandate is "effective" only when issued, and that a court of appeals has the authority to "delay" issuance of the mandate. That understanding should be given "weight" in assessing petitioner's claim. *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial construction of the Rule's validity and meaning, the construction given by the Committee is 'of weight.'") (quoting *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444 (1946)). Indeed, in light of the clear history of the Rule, the Court should reject petitioner's contrary reading. *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (deletion of provision from bill in committee strongly militated against finding that Congress intended a result it had expressly declined to enact).

B. Petitioner Cannot Show That Rule 41 Displaces the Historical Exercise of Inherent Power Over the Mandate.

Petitioner's reading of Rule 41 also ignores that courts have for centuries exercised power to reconsider their decisions before relinquishing jurisdiction over a case. Given the history of appellate court control over the mandate, even if the proper interpretation of Rule 41 were a close question, it should be resolved against petitioner. That would be true in any case, but it is especially true because petitioner reads Rule 41(d)(2)(D) as to deprive the court of appeals of jurisdiction at the moment it receives word that this Court has denied certiorari.

1. Before the Founding, English courts of equity had wide-ranging power to modify judgments after issuing them. Equity courts could "reconsider a decision and correct and revise a previously expressed opinion" whenever such revision was in the interest of justice, up until the point at which the Chancellor affixed his Great Seal. Rosemary Krimbel, *Rehearing Sua Sponte in the United States Supreme Court: A Procedure for Judicial Policymaking*, 65 Chi.-Kent L. Rev. 919, 929-30 (1989); *see also* Ronan E. Degnan & David W. Louisell, *Rehearing in American Appellate Courts*, 34 Can. B. Rev. 898, 904 (1956). Although less sweeping in their power, English law courts could "vacate or modify a judgment or decision during the term of court in which it was entered." Degnan & Louisell, *supra* at 903.

As a result of the merger of law and equity in this country, this Court adopted the "End of Term" Rule – a modified version of the old English rule for law courts. In *Bronson v. Schulten*, 104 U.S. 410 (1881), this Court observed that "[i]t is a general rule of the law that all the judgments, decrees, or other orders of the courts, *however conclusive in their character*, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified,

or annulled by that court." *Id.* at 415 (emphasis added). Any "steps" taken by a court "during that term" to modify a decision were thus well within the court's power. *Id.* By contrast, this Court explained, "all final judgments and decrees of the court pass beyond its control" at the end of the term. *Id.* Thereafter, "if errors exist they can only be corrected . . . by a writ of error or appeal as may be allowed in a court which, by law, can review the decision." *Id.*

Congress abolished the "End of Term" Rule in 1948. *See* 28 U.S.C. § 452. Rather than narrowing a court's ability to modify its opinions while it maintained jurisdiction over a matter, the effect of Section 452 was to eliminate the end of a term as the point at which a judgment "pass[ed] beyond [the] control" of a court of appeals, *Bronson*, 104 U.S. at 416, leaving the "federal courts *untrammeled* in establishing their own rules of finality." *United States v. Ohio Power Co.*, 353 U.S. 98, 102-03 (1957) (Harlan, J., dissenting) (emphasis added). This Court noted that "[w]e have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." *Id.* at 99.

Since 1948, the point at which a judgment "pass[es] beyond [the] control" of a court of appeals has been the moment at which it issues the mandate. *See Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Until the mandate issues, the case is 'in' the court of appeals . . . ."); *Rivera*, 844 F.2d at 921 ("Simply put, jurisdiction follows the mandate."); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988) ("An appellate court's decision is not final until its mandate issues."); *Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) ("Issuance of the mandate formally marks the end of appellate jurisdiction."); *Alphin*, 552 F.2d at 1035 ("Our control over a judgment of our court continues until our mandate has issued."). Petitioner concedes as much. Pet. Br. 26. Issuance of the mandate is thus an "event of considerable institutional signifi-

cance." *Rivera*, 844 F.2d at 921; *Miles v. Stainer*, 141 F.3d 1351, 1352 (9th Cir. 1998).

Accordingly, until issuing its mandate, a court of appeals possesses broad discretion to modify its judgment. *See Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and therefore, we may, at our discretion, 'amend what we previously decided to make it conform,' to the facts of the case, without need of finding that the case presents the sort of 'grave, unforeseen contingencies,' which would be necessary to recall a mandate that had already issued.") (citation omitted); *Miles*, 141 F.3d at 1352 ("Until [the issuance of the mandate], this court retains jurisdiction and is capable of modifying or even revoking a judgment. . . .") (citations omitted); *First Gibraltar Bank*, 42 F.3d at 898 (5th Cir. 1995) ("Because the mandate is still within our control, we have the power to alter or to modify our judgment."). Again, petitioner concedes the point. *See* Pet. Br. 26 (noting that a court has "the power to alter or modify the judgment prior to the issuance of its mandate").

Given this history of broad control over a judgment while an appellate court retains jurisdiction over a case, petitioner must show that Rule 41 of the Federal Rules of Appellate Procedure affirmatively displaces that power. It cannot be "'lightly assume[d] that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). This Court has declined to assume the curtailment of longstanding judicial power absent a clear expression from Congress. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 631-32 (1962) (declining to find court's inherent power to dismiss a case *sua sponte* for lack of prosecution abrogated without "a much clearer expression of purpose than [Federal] Rule [of Civil Procedure] 41(b) provides for us"); *Chambers*, 501 U.S. at 42-43 & n.8 (declining to find court's inherent power to award sanctions supplanted by, *inter alia*, 28 U.S.C. § 1927, Fed. R. Civ. P. 11, Fed. R. Civ. P. 16(f), Fed. R. Civ. P.26(g), Fed. R. Civ. P. 30(g), Fed. R. Civ. P. 37, Fed. R. Civ. P. 56(g)).[13] As explained above, petitioner cannot make the requisite showing.

2. The historical exercise of control over the mandate is also evidence that a court of appeals possesses "inherent power" to retain jurisdiction over a case until assured that it has correctly resolved the issues presented. That is exactly the power the court of appeals asserted here. Pet. App. 6.

Nearly two centuries ago, this Court recognized that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Since then, this Court has on numerous occasions determined that specific judicial actions are "necessary" to the appropriate exercise of federal courts' Article III power. The list of recognized powers includes the authority to dismiss a case *sua sponte* for failure to prosecute, *Link*, 370 U.S. at 629-30, dismiss a case *sua sponte* on *forum non con-*

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[13] In *Carlisle v. United States*, 517 U.S. 416 (1996), this Court held that Federal Rule of Criminal Procedure 29 barred a district court from granting an untimely motion for judgment of acquittal or *sua sponte* entering such a judgment. *Id.* at 433. Similarly, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Court concluded that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." *Id.* at 254. But *Carlisle* and *Bank of Nova Scotia* are the exceptions that prove the general rule. Neither Rule 29 nor Rule 52(a) was susceptible to more than one interpretation – thus both cases dealt only with the straightforward question of whether a federal court's power could trump an express Congressional command. Moreover, in *Carlisle*, this Court's decision was based in part on the fact that this Court was "unaware of any 'long unquestioned' power of the federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict." 517 U.S. at 426. The power at issue in *Carlisle* was not one that actually fell within the federal courts' traditional powers – accordingly, the general rule of construction was not implicated.

veniens grounds, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1947), stay proceedings and "control the disposition of the causes on [the court's] docket," *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), order restitution, *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*, 249 U.S. 134, 146 (1919), "control admission to its bar and to discipline attorneys who appear before it," *Chambers*, 501 U.S. at 43 (citing *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824)), punish contempts, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874), remove disruptive litigants, *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970), award attorney's fees, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), appoint private attorneys to prosecute contempt proceedings, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 (1987), and vacate a prior judgment obtained by fraud on the court, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

This list is far from exhaustive. As a general principle, a court of appeals' inherent powers are derivative of either "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Link*, 370 U.S. at 630-31, or the authority "inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.*, 249 U.S. at 146.

The court of appeals' decision in this case to invoke its "inherent power to reconsider [its] opinion prior to the issuance of the mandate," Pet. App. 6, was fully consistent with these precedents. The power of a court of appeals to delay issuing its mandate until convinced it has reached the correct result in a case, particularly if convinced that the prior decision is in clear error, or if the court's process has been abused to achieve an unfair result, is part of the "irreducible" core of a federal court's power. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 & n.7 (3d Cir. 1985) (noting cases

holding that deciding when to issue mandate is an "irreducible inherent" judicial power) (citing *Burton v. Mayer*, 118 S.W.2d 547 (Ky. 1938)).[14] This Court should reject petitioner's reading of the Rule, which would strip courts of appeals of that power.

3. Similarly problematic is that petitioner's reading of Rule 41(d)(2)(D) is a jurisdictional one. As noted above, Rules 41(b), (c), and (d)(1) vest in the courts of appeals the authority to determine when to issue its mandate and, therefore, when to terminate its jurisdiction over a case. By contrast, petitioner construes Rule 41(d)(2)(D) to deprive a court of appeals of jurisdiction the moment it receives word that this Court has denied certiorari. Although petitioner concedes at one point that a court of appeals "[u]ndoubtedly" has jurisdiction over a matter until issuing a mandate, Pet. Br. 26, that is at odds with the remainder of his argument. Petitioner states that Rule 41(d)(2)(D) leaves "no room for the discretion by the court," Pet. Br. 22, and also equates a decision to withhold issuance of a mandate at that time to a decision to recall a mandate, asserting that both decisions should be subject to the same standard of review. The clear implication of that position is that the court of appeals has no more control over the adjudication of a case post-denial of certiorari than it does after it issues its mandate. And since control over the mandate is concomitant with jurisdiction, it is difficult to view petitioner's reading of Rule 41 as requiring anything less than jurisdictional divestiture following this Court's denial of certiorari.

That jurisdictional reading of the Rule is yet another reason petitioner cannot sustain his burden of showing that Rule

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[14] *See also State ex rel. Kostas v. Johnson*, 224 Ind. 540, 550 (1946) ("We conclude, therefore, that the statute involved constitutes legislative interference with the judiciary and to the extent that it requires action by courts within specified times and deprives the courts of jurisdiction for failure to act within such time, is unconstitutional and void.").

41(d)(2)(D) completely displaces the authority of a court of appeals to delay issuance of its mandate. The Federal Rules of Appellate Procedure do not, as a general matter, limit a court of appeals' jurisdiction. Rule 1(b) previously provided that the rules "shall not be construed to extend or *limit* the jurisdiction of the courts of appeals as established by law." Although that provision was abrogated in 2002, the Advisory Committee specifically noted that the reason for the abrogation was that Congress had affirmatively empowered the Committee to make *certain* changes to the court of appeals' jurisdiction. Fed. R. App. P. 1(b), 2002 adv. com. note ("Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will 'extend or limit the jurisdiction of the court of appeals,' and subdivision (b) will become obsolete."). Not one of those changes, however, is before the Court or involves Rule 41. Given the 35-year period during which Rule 1(b) co-existed with Rule 41, any reading of Rule 41 that rendered it a curtailment on federal jurisdiction would be suspect. *Cf. United States v. Sasser*, 971 F.2d 470, 473-74 (10th Cir. 1992) (rejecting construction of Federal Rule of Appellate Procedure 4(b) that would extend time limit for government to file cross-appeal because such construction would extend appellate court jurisdiction).[15]

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[15] Time limits, even if imposed by Congress by way of a statute, are also generally not jurisdictional. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) ("Nor, since *Brock*, have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later.") (citing *Brock v. Pierce County*, 476 U.S. 253 (1986)). Completion of a task generally takes precedence over a deadline that would force a federal entity to stop halfway through the process. *See id.* at 160-61 ("The *Brock* example consequently has to mean that a statute directing official action needs more than a mandatory "shall" before the grant of power can sensibly be read to expire when the job is supposed to be done.").

II. FAR FROM SUPPORTING PETITIONER'S VIEW, *CALDERON* HOLDS THAT IT IS ISSUANCE OF A MANDATE DENYING RELIEF – NOT THE DENIAL OF CERTIORARI – THAT MAKES A FEDERAL HABEAS APPEAL "FINAL."

Petitioner contends that the denial of certiorari review by this Court made Thompson's appeal "final," such that *any* delay in issuing the mandate could only be justified under circumstances warranting recall of the mandate from another court. Petitioner's fundamental argument is that this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), supports his view that the court of appeals lacked authority to reconsider its original opinion absent a finding that its action was necessary to avoid a "miscarriage of justice." Pet. Br. 15-16. Petitioner is mistaken.

A. Petitioner's Arguments are Directly Contrary to *Calderon*.

At issue in *Calderon* was the power of a court of appeals to recall its mandate in a capital habeas case. There, the Ninth Circuit Court of Appeals issued its mandate and, 53 days later, just two days before the scheduled execution, reasserted jurisdiction to resolve the ineffective assistance of counsel claim presented in the petitioner's first federal habeas petition. 523 U.S. at 548. Although the petitioner had filed a motion to recall the mandate, the *en banc* court asserted that it was acting *sua sponte* and had decided to recall the mandate based solely on the claims presented in the first federal habeas petition. *Id.* This Court reversed, concluding that the court of appeals' exercise of its recall power constituted an abuse of discretion. *Id.* at 566. The Court held that, "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* at 558.

In setting that strict standard, this Court repeatedly identified issuance of a mandate denying habeas relief as the moment at which the state court could execute its judgment with the assurance that the federal courts' review had come to an end. The Court could not have been more explicit on this point: "A State's interests in finality are compelling when a federal court of appeals *issues a mandate* denying habeas relief. *At that point* . . . the State is entitled to the assurance of finality." *Id.* at 556 (emphasis added); *see also, e.g., id.* at 557 (noting that the court's recall came "a full 53 days after issuance of the mandate"); *id.* at 556 ("When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension."); *id.* ("Relying upon the mandate denying habeas relief to Thompson, the State of California had invoked its entire legal and moral authority in support of executing its judgment."); *id.* at 550 ("In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power [to recall] can be exercised only in extraordinary circumstances."). The Court thus made plain that the "assurance of *real* finality" that enables the state to "execute its moral judgment" attaches when the federal court of appeals issues its mandate denying habeas relief. *Id.* at 556 (emphasis added).

This Court also made clear that the miscarriage of justice standard applies only to the limited subset of cases in which a court of appeals recalls a mandate that has already been issued, and has no bearing on cases arising out of a number of *other* circumstances – including, for example, "a case where the mandate is stayed under Federal Rule of Appellate Procedure 41 pending the court's disposition of a suggestion for rehearing en banc." *Id.* at 557.[16] Petitioner's wholesale

[16] There is no reason to distinguish a case in which the mandate has been stayed pending *en banc* review from a case in which the mandate has been withheld or stayed pending panel rehearing.

reliance on *Calderon* as setting forth the standard for reviewing the decision of a court of appeals to stay or withhold issuance of its mandate is, for this reason as well, contrary to the terms of the decision.

Perhaps most tellingly, this Court in *Calderon* expressly rejected petitioner's precise argument that a case became final at some point prior to the issuance of the mandate. There, the State of California asserted – as Petitioner does here, Pet. Br. 16, 25-33 – that the court of appeals' decision became "final" upon the denial of certiorari by this Court, and that, as a result, any action thereafter could only be justified by the extraordinary circumstances permitting the recall of a mandate. Br. of Petitioner, *Calderon v. Thompson* (No. 97-215), 1997 WL 578173 at *16-17 (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)); Reply Br. of Petitioner, *Calderon v. Thompson* (No. 97-215), 1997 WL 714676 at *12 (same).[17] The Court rejected that argument, holding that, for purposes of deciding when a case has become "final" in *this* context, the critical event is issuance of the mandate. *Calderon*, 523 U.S. at 556-57. The Court did not, as petitioner would have it, attach *any* significance to its previous denial of certiorari. *Cf. id.* at 557 (listing several critical dates that preceded the court's recall of its mandate, including the "issuance of the mandate," but excluding mention of the denial of certiorari). Petitioner's argument is thus little more than an attempt to relitigate a battle lost in *Calderon*.

[17] The State took the same view at oral argument:

JUSTICE KENNEDY: How do you define when the first court of – habeas corpus proceeding comes to a close?

MS. WILKENS: That would be with the denial of certiorari by this Court or the expiration of time for seeking certiorari. . . .

JUSTICE KENNEDY: And what's the authority you have for that?

MS. WILKENS: Griffith v. Kentucky, Your Honor.

The Oyez Project, Oral Arg. Tr., *Calderon v. Thompson*, *at* http://www.oyez.org/oyez/resource/case/1014/argument/transcript.

Although there is no need to reconsider the point, the *Calderon* Court's conclusion was fully consistent with the principle that "[a]n appellate court's decision is not final until its mandate issues." *Lingle*, 847 F.2d at 97. As this Court has recognized, a court of appeals is free to revisit a prior decision on panel or *en banc* rehearing until the mandate issues. Courts of appeals may – and sometimes do – delay issuance of their mandates following the denial of certiorari, and may thereafter vacate their prior decisions. As part of that process, a court of appeals may (as here) require further proceedings in the district court. Petitioner's contrary view that, despite all of this, this Court's denial of certiorari makes a federal habeas appeal "final," is untenable.

Indeed, it is precisely because the power to recall a previously-issued mandate is so "extraordinary," *id.* at 550, that a court of appeals has *ordinary* discretion to determine when to issue its mandate in the first instance. Properly understood, *Calderon* is but the latest in a long line of authority – beginning with *Bronson* – to recognize that a court has far greater discretion to take "steps" to alter or modify their decisions before they become final and "pass beyond its control." *Bronson*, 104 U.S. at 415-16. Far from supporting petitioner's view, *Calderon* makes clear that a court of appeals signals to the states that habeas proceedings are complete only by issuing a mandate denying relief. Accordingly, the "miscarriage of justice" standard does not apply here.

B. The Other Contexts Petitioner Invokes are Inapposite.

Lacking support in *Calderon*, petitioner argues that other contexts show that Thompson's federal habeas petition became "final" when this Court denied certiorari review, even though the court of appeals did not thereafter issue its mandate. *Cf. Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality is variously defined; like many legal terms, its precise meaning depends on context."). Even if this Court had not already rejected that view in *Calderon*, not one of

those contexts has any bearing on this case. To the contrary, the only cases petitioner cites that are relevant to the question here support Thompson.

Petitioner first cites 28 U.S.C. § 1257(a), which empowers this Court to review a "final judgment" of a state court of last resort. Pet. Br. 26-28. "Finality for purposes of § 1257(a)," says petitioner, "is not contingent upon the issuance of an appellate court mandate." *Id.* at 27. That is true. It is also irrelevant. State appellate courts are, like federal courts of appeals, affirmatively empowered to stay the issuance of *their* mandates pending the resolution of certiorari review by this Court. *See, e.g.*, Tenn. R. App. P. 42(c) ("In cases in which review by the Supreme Court of the United States may be sought, the appellate court whose decision is sought to be reviewed or a judge thereof . . . may stay the mandate."). It is neither surprising nor important to this case that this Court may review "final judgments" even in cases in which the highest court of a State, or a federal court of appeals, has itself stayed the issuance of the mandate. A contrary view would mean that, by staying the issuance of a mandate, an appellate court (state or federal) could also bar certiorari review as a jurisdictional matter. *Cf. Market St. Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551-52 (1945) (noting that the "latent powers" of state courts to reconsider their judgments "are too variable and indeterminate to serve as tests of our jurisdiction").[18]

Petitioner also invokes both 28 U.S.C. § 2244(d)(1) and the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), to conclude that a decision becomes "final" when the "time for filing a petition for a writ of certiorari has elapsed

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[18] *Market Street Railway Co.* does not support petitioner. *See* Pet. Br. 26. It held only that an appellate court's "latent power" to reconsider a decision does not deprive this Court of jurisdiction; not that, as petitioner suggests, a decision to exercise that "latent power" after this Court denies certiorari is a nullity.

or a timely filed petition has been finally denied." Pet. Br. 28-29 (quoting *Caspari v. Bohlen*, 510 U.S. 333, 390 (1994)). Those contexts have nothing to do this case. Both involve petitions for certiorari filed directly from the highest court of a State, and seek to draw a bright-line for when "finality" attaches to the expiration of direct review of *that* decision. There is no question under those circumstances as to whether it is the denial of a petition for certiorari, or a federal appellate court's issuance of its mandate, that makes the case "final": At the point at which a state conviction could possibly become "final," *there is no federal appellate court mandate*. That this Court has adopted a denial-of-certiorari based finality rule to mark "'the important distinction between direct review and collateral review,'" *Teague*, 489 U.S. at 307 (internal quotation marks omitted), and that Congress has done the same to mark the running of the limitations period in which a state prisoner may file a habeas petition in federal district court, 28 U.S.C. § 2244(d)(1)(A), bears no relevance to the question presented in this case.

Petitioner's reliance upon AEDPA is doubly misplaced because the scope of AEDPA is not before the Court. *See infra* nn. 23-24. This Court expressly denied review of those questions. Petitioner's *amicus*, in fact, concedes that the court of appeals' decision was consistent with AEDPA. Br. *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 14 ("Br. *Amicus Curiae*"). Still, both petitioner and his *amicus* attempt to address AEDPA through the back door, suggesting that its principles "inform" the analysis. *See id*; Pet. Br. 29. AEDPA only decides what "finality" triggers the limitations period for seeking habeas review in federal district court. *Compare* 28 U.S.C. § 2244(d)(1) *with* Fed. R. App. P. 41(c), 1998 adv. com. note ("[a] court of appeals' judgment or order is not final until

issuance of the mandate").[19] It is difficult to see how AEDPA could possibly "inform" the analysis of the proper construction of Rule 41, a rule of general application that cannot be confined to habeas cases. In any event, to the extent AEDPA informs the analysis, this Court decided in *Calderon* that it is issuance of the mandate that marks the critical "finality" point in this context.

Similarly mistaken is petitioner's assertion that *Clay*, 537 U.S. at 522, is "particularly instructive" in its decision to reject a "mandate-based definition" of finality in favor of one defined by the Court's resolution of a petition for a writ of certiorari. Pet. Br. 30. The question in *Clay* was what event – denial of certiorari or issuance of the mandate – begins to run the one-year time limitation for post-conviction relief under 28 U.S.C. § 2255. That rule of finality has nothing to do with when a decision of a court of appeals is "final," but simply addressed the triggering event for statutory timeliness purposes. Nor did *Clay* reject the "mandate-based definition" of finality, as Petitioner suggests, because it was "merely 'ministerial'." Pet. Br. 33. Rather, the Court's holding rested on the need to align the Court's and Congress' restrictions on the ability of habeas petitioners to seek collateral review – specifically, the need to conform the time limits set forth in the habeas statute for federal prisoners (§ 2255) with those in the statute for state prisoners (§ 2244(d)(1)). *Clay*, 522 U.S. at 527-31. Nothing in the Court's decision minimizes the jurisdictional significance of

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[19] Nothing in AEDPA evinces an intent to limit the power of federal appellate courts to *sua sponte* revise their decisions prior to the relinquishment of jurisdiction. *Compare Tyler v. Cain*, 533 U.S. 656, 661 (2001) ("AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications.") *with Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997) (noting that AEDPA's restrictions "do[ ] not purport to limit the court's own power to review its decisions or to undertake a rehearing" on its own initiative).

the mandate's issuance; to the contrary, the Court expressly acknowledged that "finality attends issuance of the appellate court's mandate" in other contexts. *Id.* at 527.

3. Petitioner also fails to appreciate the significance of cases he cites rejecting his view. Petitioner notes, for example, that for certain purposes under the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, and the former version of Federal Rule of Criminal Procedure 33, "some courts have held that finality attaches upon issuance of the appellate court's mandate." Pet. Br. 31 n. 14. According to petitioner, "a mandate-based definition of finality in those contexts is entirely reasonable" because "[i]ssuance of the mandate is necessary to transfer jurisdiction back to the district court" for further proceedings. *Id.* That is no distinction at all. As the decision below illustrates, a federal appellate court's mandate will sometimes *require* further evidentiary proceedings in the district court, rather than denying all habeas relief. *See* 28 U.S.C. § 2254(e).[20]

Petitioner's focus on whether further proceedings are necessary in the lower courts also ignores that issuance of a mandate denying relief signals the end of *appellate proceedings*. The Speedy Trial Act, for example, sets a 70-day limit on when a criminal defendant may be tried or retried following an appeal, mistrial, order for new trial, or a collateral attack. 18 U.S.C. § 3161(d)(2) (providing that the time for trial or retrial "shall commence within seventy days from the date the action occasioning the trial becomes final."); *id.* § 3161(e) (same for "retrial"). The courts of appeals that have addressed this issue have concluded that the appellate court's decision only becomes "final" upon issuance of the mandate, and that the limitations period runs from that date. *See*

[20] Petitioner's suggestion that a court of appeals may not, following the denial of certioriari, issue a mandate instructing the district court to conduct a hearing is based on his flawed jurisdictional reading of Rule 41(d)(2)(D). *See* Pet. Br. 20.

Rivera, 844 F.2d at 920 (noting that six circuits that have addressed the issue have adopted the mandate-based rule); *see also United States v. Long*, 900 F.2d 1270, 1276 (8th Cir. 1990) (holding that the Speedy Trial Act's clock commences once the district court *receives* the mandate); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987) (same).[21] The rationale is that, "[s]imply put, jurisdiction follows the mandate." *Rivera*, 844 F.2d at 921; *see United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981) (noting that "a case is not closed" until the mandate issues, as the "parties may petition the court for a rehearing" and the "court may decide to rehear the case en banc") (citing Fed. R. App. P. 40 and 41). The same is true here.

For similar reasons, the courts of appeals uniformly concluded that the two-year limitation period in the former Rule 33 for a motion for a new trial based on newly discovered evidenced began to run after the issuance of the appellate mandate. *See United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (collecting cases from other circuits in agreement).[22] Three of those courts explicitly concluded that the "date of the denial of a petition for writ of certiorari by the United States Supreme Court is irrelevant" for purposes of finality under Rule 33. *United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States v. Lussier*, 219 F.3d 217, 218 (2d Cir. 2000) (same); *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983) (same).

[21] One court has specifically rejected a certiorari-based finality rule for Speedy Trial Act purposes. *See United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1989) ("An application to seek certiorari or a decision to make such application has no effect on the finality of an appellate decision unless the mandate of the court is stayed or withdrawn in connection with such event.") (citing Fed. R. App. P. 41(b)).

[22] Rule 33 was amended in 1998 to make the date of the trial court's verdict the "triggering event" for the filing of a motion for a new trial, rather than the date of the appellate court's "final judgment." Fed. R. Crim. P. 33, 1998 adv. com. note.

Thus, by petitioner's own account of the caselaw, "finality" is triggered in cases in which the relevant question is when appellate proceedings have concluded by issuance of the mandate alone. There is no need to belabor the point. In this precise context, this Court has identified issuance of the mandate denying habeas relief, not the denial of certiorari review, as the critical point of "finality."

C. Petitioner's Reliance Arguments are Misplaced.

Petitioner also contends that he was entitled to rely upon this Court's denial of a petition for a writ of certiorari as a signal that federal review was at an end. Thus, petitioner contends, he was unfairly surprised by the decision of the court of appeals to vacate its prior order. This account is both legally untenable and factually insupportable.

As to the law: Contrary to petitioner's arguments, the court of appeals was not stripped of jurisdiction by this Court's denial of the petition for a writ of certiorari. Accordingly, any supposed "reliance" petitioner placed on the denial of the petition was simply misplaced. *See, e.g., United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) ("The legitimacy of an expectation of finality of an appellate court order depends on the issuance or not of the mandate . . . ."). The *Calderon* Court repeatedly emphasized that "real finality" attaches only when the mandate has issued. *Calderon*, 523 U.S. at 556.

Moreover, despite denying Thompson relief, the federal district court, on February 17, 2000, entered a stay of Thompson's execution "pending any appeal." J.A. 89. Because the court of appeals never issued its mandate, Thompson's habeas appeal was never final, and the district court's stay remained in effect when petitioner *moved* for an execution date. Petitioner's motion for an execution was thus "void." 28 U.S.C. § 2251. Petitioner's representation to the Tennessee Supreme Court that Thompson had "completed the standard three-tier appeals process, making the setting of

an execution date appropriate," BIO App. 219, also failed to mention that the mandate had not issued, rendering the motion improper under Tennessee law. *See* Tenn. Sup. Ct. R. 12.4(a) (requiring the State to file a motion to schedule an execution with the court "*[a]fter*" the prisoner has "*completed* the standard three-tier appeals process") (emphasis added); *Tennessee v. Alley*, No. M1991-00019-SC-DPE-DD, (Tenn., Jan. 6, 2005), *available at* http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/Alley.htm (denying State's motion to set execution date as "premature" where court of appeals had not issued mandate); *cf. Ohio v. Scott*, 741 N.E.2d 535, 535 (Ohio 2001) (denying motion to set execution date as "premature" and ordering State, *inter alia*, "to file notice when the United States Court of Appeals for the Sixth Circuit issue[s] its mandate").

Petitioner's view is also incorrect as to the facts. After the court of appeals denied Thompson's petition for rehearing *en banc*, Thompson sought and received an order staying the mandate pending this Court's resolution of his petition for writ of certiorari. On August 19, 2003, while Thompson's certiorari petition was pending, *petitioner* moved the court of appeals to reconsider its July 26, 2002, order expanding counsel's appointment to include state court proceedings – a motion that was unresolved at the time this Court denied certiorari but that was critical in subsequent state court proceedings. The docket sheet indicates that, shortly after the State filed the motion to reconsider, the court of appeals recalled the case record from the district court – an unusual step, to be sure, for a court that had already issued a "final" opinion. In addition, this Court denied Thompson's petition for writ of certiorari on December 1, 2003, and despite the State's reading of Rule 41(d)(2)(D), the court of appeals, acting on Thompson's motion, continued the stay of the mandate pending resolution of Thompson's petition for rehearing.

For these reasons, petitioner was at the very least on constructive notice that the court of appeals had not issued its mandate. And, given that a federal court stay was in effect "pending" the "appeal," petitioner should have been on heightened alert as to the need to obtain the mandate before returning to State court. *See* 28 U.S.C. § 2251. Nevertheless, petitioner took no steps to ensure that the decision was final. To the contrary, even before the court of appeals received this Court's order denying the petition for rehearing, petitioner filed a motion to schedule Thompson's execution in the Tennessee Supreme Court, in which he represented that "Thompson has completed the standard three-tier appeals process, making the setting of an execution date appropriate" under state law. BIO App. 220. At a minimum, petitioner failed to exercise due diligence to ensure that the mandate had issued and that federal proceedings had ended. *See Rivera*, 844 F.2d at 920 (noting that a "diligent appellate attorney" should "ascertain[ ] when the mandate issues"); *id.* at 921 (noting that neither party "called the court's attention to the fact that the mandate was not issued on the 21st day, nor did any party move for issuance of the mandate"); *see also* Fed. R. App. P. 41, 1998 adv. com. note (noting that "the parties can easily calculate the anticipated date of issuance and *verify* issuance of the mandate) (emphasis added).

D. Courts of Appeals Are Not Abusing Their Power to Withhold Issuance of the Mandate.

There is no dispute that, if not sparingly exercised and "limited to the most rare and extraordinary case[s]," the recall power at issue in *Calderon* is subject to abuse. *Calderon*, 523 U.S. at 558; *see id.* at 569 (Souter, J., dissenting) ("[T]here lurks in the background the faint specters of overuse and misuse of the recall power."). Thus, the heightened threshold that an appellate court has historically had to meet before recalling its mandate, *see, e.g., Alphin*, 552 F.2d at 1035 ("to avoid injustice" in "exceptional cases"), and that an appellate court must now satisfy in the federal habeas

context, *see Calderon*, 523 U.S. at 558 ("miscarriage of justice"), provides structural assurance that the exercise of the recall power remains an extraordinary occurrence.

Petitioner suggests that the same concerns are present here. As this case illustrates, that is not so. The court of appeals here denied relief, denied rehearing, and denied rehearing *en banc*. This Court then denied certiorari review. There is little reason to believe that a panel initially denying habeas relief will, following the denial of panel rehearing, *en banc* review, and certiorari review by this Court, thereafter *grant* habeas relief for anything other than compelling reasons.

Nor is there any suggestion by petitioner that the court of appeals had anything less than a compelling reason to modify its prior decision in this case. This is a case in which the same panel that denied relief to a habeas petitioner decided unanimously to withdraw its previous opinion. It is also a case in which the "initiative" for the new decision came from the judge who authored the original (and now withdrawn) opinion. Pet. App. 8 (Suhrheinrich, J., concurring in part and dissenting in part) ("I wish it to be known that the initiative for this decision came from my chambers. The majority's ruling is based upon their review of my draft opinion, prepared after my discovery, and the hundreds of hours of work that followed, reviewing the entire record, researching the law, and drafting this opinion."). Moreover, the reason for the modification was a clear error in the prior decision – that is, to correct the erroneous conclusion that there was no factual dispute over Thompson's mental illness at the time of the offense. Far from an abuse, the court properly performed its duty to undo "what it had no authority to do originally, and in which it, therefore, acted erroneously" – a classic ground for reconsideration of a previous decision. *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891).

The concerns identified by petitioner's *amicus* are even more misplaced. Br. *Amicus Curiae* at 10-14. Much of its brief is directed toward arguing a question that is not before

this Court.[23] *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule, . . . we do not decide issues outside the questions presented by the petition for certiorari.") (citing Supreme Court Rule 14.1(a)). The remainder is devoted to attacking a straw man. *Amicus* purports to demonstrate that "post-certiorari litigation" has become a "routine" device to evade AEDPA's successive petition limits, and contends that application of the *Calderon* miscarriage of justice standard to post-certiorari stays and reconsideration is necessary to prevent further evasion of the statute. *Id.* at 5-6.

[23] After chronicling the history and goals of AEDPA's restrictions on successive petitions, Br. *Amicus Curiae* 10-14, *amicus* concedes that "the statute does not apply" to this case, which "presumably is why this Court's grant of certiorari was limited to Question 2 [of the petition for writ of certiorari], abuse of discretion, not Question 1, violation of § 2244(b)," id. at 14. Nor could any argument be made that AEDPA's restriction on successive petitions applies here. There is no dispute that the court of appeals acted on its own initiative and not, by contrast, "pursuant to a prisoner's 'application.'" *Calderon*, 523 U.S. at 554 (quoting 28 U.S.C. § 2244(b)). Though a "court's characterization of its action as *sua sponte*" is not dispositive, the court of appeals did not consider "claims or evidence *presented*" in the prisoner's "*later* filings" that might "disprove[ ]" such a characterization. Id. (emphasis added). The court here considered the claims and evidence already before the court at the time of Thompson's first petition, leaving little doubt that it was acting on its own initiative and not upon a successive application. *See supra* at 4-6 (witness list filed with the district court noted that Dr. Sultan would testify to Thompson's mental state at the time of the crime, and that the testimony was further referenced in Thompson's reply brief and petition for rehearing before the Court of Appeals); *see also* Pet. App. 143 (referencing the deposition and accompanying record of Dr. Sultan). Thompson's Rule 60(b) motion – filed during appellate review of his first application – cannot be considered a "second or successive" application, as that motion was denied by the district court and Thompson never appealed that denial or sought to have the court of appeals take into account its contents. (Accordingly, this case does not present the issues raised in *Gonzalez v. Sec'y for Dep't of Corr.*, 125 S. Ct. 961 (2005), currently pending before this Court.) Rather, the court simply exercised its authority to supplement the record in the course of its *sua sponte* reconsideration.

But "[p]ost-certiorari litigation" is a catch-all for a number of different acts, by courts and habeas petitioners, that might arise after this Court denies certiorari – including recall of mandates, stays of mandate, the filing of successive petitions, the filing of Rule 60(b) motions, and the filing of civil suits. All but *one* of the nineteen petitioners *amicus* identifies were engaged in this "post-certiorari litigation" *after the mandate issued*. *See* Br. *Amicus Curiae*, App. A1-A7 (PACER entries reflecting that the mandate had issued following cert denial or rehearing denial, and prior to subsequent litigation, for each of the petitioners except Beardslee). To the extent that failed attempts to file successive petitions, *id.* at 7, unsuccessful motions to recall mandates, *id.* at 7-8, and two requests for a stay of mandate following denial of certiorari, only *one* of which was successful, *id.* at 8, reflect a systemic problem that threatens AEDPA's core aims, it appears that the Ninth Circuit has adequately addressed the problem. *Amicus* is simply attacking the wrong court for the wrong problem by identifying the wrong source of authority.

III. THE COURT SHOULD AFFIRM IF THE PROPER STANDARD IS ANYTHING BUT *CALDERON*

1. Petitioner's only argument in this case is that, because issuance of the mandate by the court of appeals was required "immediately" upon the receipt of this Court's order denying certiorari, the court of appeals' decision to withhold issuance of the mandate was no different than a decision to recall a mandate previously issued. It is only through reading Rule 41 as a *de facto* jurisdictional rule that petitioner can even suggest that *Calderon*'s strict test applies. Petitioner has no fallback position. Accordingly, if this Court concludes that any standard other than *Calderon* applies, it should affirm the judgment below.

For the reasons explained above, this case is unlike *Calderon*. Instead, the proper standard of review to apply to the court of appeals' decision is the ordinary test for abuse of discretion. *See, e.g., Wilson*, 357 F.3d at 464. The court of

appeals has already exercised its discretion to amend what it previously decided prior to the issuance of its mandate, and it is unnecessary to remand the case for application of a standard the court has already concluded is met.[24]

[24] The court *unanimously* agreed that the case satisfied the heightened "interests of justice" standard required to supplement the record on appeal. Pet. App. 3-4 (collecting authorities in support of power of courts of appeals to supplement record under "special" or "extraordinary" circumstances "where the interests of justice require"); *see id.* at 114-15 (Suhrheinrich, J., concurring in part and dissenting in part) (agreeing with majority that court could supplement the record because the "special circumstances" of the case, "if left unaddressed, will result in a grave miscarriage of justice"). Although not before the Court, there is no question that the court of appeals was empowered to supplement the record. Even in habeas proceedings, "ample authority exists to permit supplementation in appropriate circumstances." 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 37.1b, at 1631-32 & n.37 (4th ed. 2001) (collecting cases); *cf. Dobbs v. Zant*, 506 U.S. 357, 358 (1993) (per curiam) (court of appeals erred in rejecting habeas petitioner's motion to supplement record on appeal with closing argument transcript). This reflects the understanding that "a motion is caught by § 2244(b) and § 2255 only if it is second or successive to a proceeding that 'counts' as the first." *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) (district court erred in treating motion to amend pursuant to Fed. R. Civ. P. 15(a) as successive petition). As Judge Easterbrook has explained, inherent in AEDPA's grant of "one full opportunity for collateral review for every prisoner" is an "entitlement to add or drop issues while the litigation proceeds" – that is, until the prisoner has "receive[d] one complete round of litigation," which includes "exhaust[ing] appellate remedies." *Id.* at 804-05. Subsequent amendments to a petition thus do not constitute a successive application. *See id.* Similarly, enlarging the appellate record during a prisoner's first round of collateral review to include new information does not run afoul of the restrictions on successive petitions. *See, e.g., Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986) (remanding motion to supplement record with instructions to conduct hearing on threshold issue of inexcusable neglect where defense counsel claimed to have mistakenly believed affidavits and depositions were already included in the district court record); *United States v. Kennedy*, 225 F.3d 1187, 1992 (10th Cir. 2002) ("[W]e agree with the Eleventh Circuit [in Ross v. Kemp] that, under some circumstances, we have an inherent equitable power to supplement the record on appeal."). Enlarging the record is often necessary to avoid successive litigation on a particular claim. *Ross*, 785 F.2d at 1478 (citing *Sanders v. United States*, 373 U.S. 1, 22 (1963)).

2. The record is devoid of any facts suggesting that the court of appeals abused its discretion. One reason is the nature of petitioner's litigation strategy. Petitioner did not at any time after January 23, 2004, make any inquiry into why the mandate had not issued or move for its issuance. If petitioner had so moved, the court of appeals would have been given the opportunity to explain *then* the basis of its *sua sponte* reconsideration. Indeed, even after the court of appeals vacated its prior decision, petitioner sought neither panel rehearing nor rehearing *en banc* to challenge the exercise of the panel's power – instead litigating the matter in the first instance before this Court.

In any event, the court of appeals' decision was within its discretion. The court was exercising the traditional power of appellate courts to withhold issuance of the mandate until assured they have correctly resolved the issues presented. After "hundreds of hours of work" and a review of the "entire certified" record, Judge Suhrheinrich concluded that vital evidence concerning Thompson's mental health at the time of the crime created a factual dispute that precluded the summary dismissal of Thompson's capital habeas claim. All three members of the panel then agreed to vacate the district court's order granting summary judgment, remanding the case to the district court for an evidentiary hearing.

As noted above, petitioner's reliance on the "finality" of the court of appeals' original decision was unreasonable in light of the multiple court-ordered stays of the mandate, the non-issuance of the mandate, petitioner's own unresolved collateral motion, and the court of appeals' recall of the record. But, in any event, the Federal Rules of Appellate Procedure do not require appellate courts to notify the parties as to their decision to withhold issuance of their mandate.

Rather, a directive to the clerk not to issue the mandate suffices. *See, e.g., Sparks*, 604 F.2d at 979. Litigants are rarely aware of *sua sponte* decisions by the courts of appeals *en banc* to reconsider previous panel opinions. There is no reason to impose an impractical notification requirement on *sua sponte* decisions by panels – like this one – electing to modify a decision. Rather, the burden is on a party seeking to execute a judgment to confirm that a mandate has issued. *See, e.g.*, Fed. R. App. P. 41, 1998 adv. com. note ("the parties an easily calculate the anticipated date of issuance and *verify* issuance of the mandate) (emphasis added).

Petitioner's complaint that the court of appeals "never explained"[25] why the mandate was not issued rings similarly hollow. Pet. Br. 23. Petitioner himself did not file a motion for issuance of the mandate during the months following this Court's denial of certiorari or take any other steps, such as contacting the clerk. Moreover, to the extent petitioner found the panel's explanation, *see* Pet. App. 81 n.12, unclear or unconvincing, the better course would have been to seek clarification in the court of appeals by petitioning for rehearing or rehearing *en banc*, and not to mount a categorical attack upon the authority of appellate courts in this Court.[26]

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[25] Petitioner makes a passing suggestion that the court of appeals' decision was contrary to Sixth Circuit Rules, Pet. Br. 22, but that is incorrect. Sixth Circuit Rule 41(c) is, like Fed. R. App. P. 41(d)(2)(D), limited to cases in which a stay has been entered solely for the resolution of a petition for certiorari. In any case, petitioner should have brought that supposed error to the attention of the panel or the *en banc* court.

[26] Petitioner does not even attempt to argue that the underlying merits of the court of appeals' decision remanding the case for an evidentiary hearing was wrongly decided. With good reason. As *amicus curiae* the National Association of Criminal Defense Lawyers explains in its brief, the substance of the court of appeals' decision is absolutely sound. Dr. Sultan's report and deposition plainly demonstrate that Thompson was entitled to an evidentiary hearing. *See* Brief for Amicus Curiae National Association of Criminal Defense Lawyers Supporting Respondent. Petitioner's statement of facts incorrectly states that the court of appeals

3. At the very least, the Court should remand the case to the court of appeals. Indeed, even if this Court concludes that *Calderon* applies, it should remand to the court of appeals for application of that standard. *See Johnson v. California*, 125 S. Ct. 1141, 1152 (2005) (reversing and remanding the case to allow the court of appeals to apply new standard) (citing *Consol. Rail Corp. v. Gotshall*, 512 U.S. 532, 557-58 (1994) (same) and *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (same)). The court of appeals has not had any opportunity to apply that standard, and there are indications that the panel might grant relief even under it, either because a Rule 41(d)(1) stay was in effect, *Calderon*, 523 U.S. at 557, or because a "fraud" was committed upon the court.[27] Given the nature of petitioner's

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"made no finding that Thompson was not at fault in failing to develop mental health evidence in state court or that the limitations set forth in 28 U.S.C. § 2254(e)(2) were satisfied." Pet. Br. 14. Judge Suhreinrich, writing for the court on the ineffective assistance of counsel claim, concluded that, "[i]n light of Dr. Blair's postconviction testimony that a full history was needed to determine whether Thompson was schizophrenic at the time of the offense, the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1)." Pet. App. 89; *see also id.* at 10-16 (detailing Thompson's efforts to obtain funding for further investigation). Because the court of appeals found that the necessary evidence was unavailable due to the state courts' denial of funds, rather than a lack of diligence by Thompson, the limitations set forth in § 2254(e) are inapplicable. *See Williams*, 529 U.S. at 442-43 (state post-conviction counsel's request for funding to hire an investigator to develop juror bias claim was a "reasonable effort to discover the claims" and "§ 2254(e) will not bar [the prisoner] from developing them in federal court.").

[27] In *Calderon*, this Court exempted from its standard cases involving "fraud upon the court," which "call[] into question the very legitimacy of the judgment." *Calderon*, 523 U.S. at 557; *see Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1278 (11th Cir. 2004), *cert granted* 125 S. Ct. 961 (2005) (*Calderon* recognized a fraud-on-the-court exception to its actual innocence standard). Judge Suhrheinrich concluded that "fraud" had been committed and would have ordered the district court to conduct "full evidentiary hearings" on the issue. Pet. App. 81-115

strategy, and the lack of a developed record on these questions, this Court should not address them in the first instance.

CONCLUSION

The Court should affirm the decision or remand the case for further proceedings in the court of appeals.

Respectfully submitted,

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(Suhrheinrich, J., concurring in part and dissenting in part). Though the other two judges did not make that finding, they conceded the possibility that a fraud had been committed, but opted instead to give habeas counsel's explanation of "mistake" the benefit of the doubt absent a full record. *See id.* at 2-3. It is impossible to know whether the majority would have agreed with Judge Suhreinrich's dissent if forced to confront the possibility of fraud squarely – that is, if the majority could not avail itself of "the principle of Occam's razor," *id.* at 3.

Appendix

Rule 41 of the Federal Rules of Appellate Procedure provides:

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals mu[illegible] issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

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No. 04-514

In The Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

I. THE COURT OF APPEALS' HISTORICAL POWER TO CONTROL ITS MANDATE DOES NOT PERMIT IT TO DISREGARD THE UNAMBIGUOUS REQUIREMENTS OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Respondent argues that, despite the plain language of Rule 41(d)(2)(D), a court of appeals has broad discretion – indeed "untrammeled" authority – to control its mandate after this Court denies certiorari. However, the rules of appellate procedure, prescribed by this Court[1] and approved by Congress,[2] cannot be so easily cast aside. It bears noting at the outset that even respondent recognizes that Rule 41(d)(2)(D) requires issuance of the mandate upon receipt of this Court's order denying certiorari. Respondent interprets Rule 41(d)(2)(D) to mean that, "*if* the court of appeals has stayed issuance of the mandate for the reason that this Court may grant certiorari, then the clerk of a court of appeals must, upon receipt of the denial of certiorari, issue the mandate" (Resp. Br. 11-12, 13-14) (emphasis in original), thus limiting the rule's reach only to "cases in which the mandate has been stayed for the reason that this Court may grant certiorari." (Resp. Br. 13-14) Building on this interpretation, respondent takes

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[1] "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072.

[2] "The Supreme Court shall submit to Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." 28 U.S.C. § 2074.

two different tacks. He first suggests that the Sixth Circuit stayed or withheld its mandate for reasons unrelated to the petition for writ of certiorari, rendering the issuance requirement of Rule 41(d)(2)(D) inapplicable. Second, respondent contends that, in any event, the mandatory language of Rule 41(d)(2)(D) is really discretionary. But these contentions fail to afford respondent safe harbor because the Sixth Circuit's own orders refute the first contention, and the most basic rules of statutory construction fatally undermine the second.

A. The Sixth Circuit Did Not Stay Issuance of Its Mandate for any Reason Independent of Respondent's Petition for Writ of Certiorari; It Simply Failed to Issue It as Required by Rule 41(d)(2)(D).

Respondent repeatedly alludes to an affirmative "decision" by the Sixth Circuit to withhold issuance of its mandate for a reason independent of the certiorari petition: "After *deciding to delay* issuance of its mandate for reasons unrelated to this Court's denial of certiorari . . . " (Resp. Br. 11) (emphasis added); "there is nothing in Rule 41(d)(2)(D) addressing cases in which the court of appeals has either *stayed or withheld issuance of the mandate for reasons unrelated* to this Court's resolution of a petition for certiorari" (Resp. Br. 15) (emphasis added); "[I]f, as here, a court of appeals *decides under Rule 41(b) to withhold issuance* of its mandate for reasons having nothing to do with the disposition of a petition for a writ of certiorari before this Court, there is nothing in Rule 41(d)(2)(D) that strips the court of that power." (Resp. Br. 16-17) (emphasis added) But the Sixth Circuit's own orders conclusively refute that characterization of its behavior in this case.

In the period between the court's original judgment affirming the decision of the district court (Pet. App. 117) and the decision at issue here (Pet. App. 1), the Sixth Circuit issued only three orders: one denying rehearing, either en banc or by the original panel (Pet. App. 346); one staying issuance of the mandate "to allow [Thompson] time to file a petition for a writ of certiorari" (Pet. App. 347); and one extending the stay "to allow [Thompson] time to file a petition for rehearing from the denial of certiorari." (Pet. App. 348) The court did not enter any order before the denial of certiorari staying its mandate for any reason other than the disposition of respondent's certiorari petition, let alone for the purpose of rehearing the underlying merits of its earlier decision. *Compare First Gibralter Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (prior to denial of certiorari, mandate stayed to permit en banc poll in light of change in governing law); *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977) (mandate stayed before time for mandatory issuance under Rule 41(d)(2)(D) to permit consideration of petition for rehearing in light of change in federal statutory law). *See also Wilson v. Ozmint*, 357 F.3d 461 (4th Cir. 2004) (court entered order 22 days after entry of its opinion and judgment temporarily withholding mandate pending disposition of petition for rehearing).[3] When both of the Sixth Circuit's stay orders

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[3] None of the cases respondent cites for the proposition that a court of appeals possesses broad authority to withhold issuance of the mandate after the denial of certiorari addresses the unique comity and federalism concerns implicated in actions under 28 U.S.C. § 2254. (Resp. Br. 18) The only habeas case he cites for that proposition, *Fairchild v. Norris*, 51 F.3d 129 (8th Cir. 1995), aids the petitioner. In *Fairchild*, a pre-AEDPA habeas case, the Eighth Circuit denied the petitioner's post-certiorari motion to stay and/or recall the mandate in light of this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995).

(Continued on following page)

expired by their own terms, the court never explained why the mandate failed to issue thereafter. It merely observed in its subsequent opinion that it had not issued: "[W]e rely on our inherent authority to reconsider our [earlier] opinion prior to issuance of the mandate, which has not yet issued in this case." (Pet. App. 6)

Although respondent recites a litany of reasons why a court of appeals "may sometimes choose to delay issuance of the mandate," *i.e.*, new evidence, clerical error, a change in governing law, the existence of a related question before the court of appeals or this Court, or a decision by the court that it "needs more time to reach the right result" (Resp. Br. 17-18), none of these circumstances was ever cited as a basis for the Sixth Circuit's stay of the mandate in this case nor offered by the court as justification for its failure to comply with Rule 41(d)(2)(D). In view of the Sixth Circuit's only statements on the subject of its mandate, respondent can only assume that the failure to issue it was the result of either of two possible causes: (1) a clerical or ministerial error by the court clerk; or (2) some private communication from the court affirmatively instructing the clerk to withhold the mandate. Under neither circumstance can the action of the court be justified. If the former, the Sixth Circuit should not be

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Contrary to respondent's assertion, the Eighth Circuit did not "rehear and vacate" its prior decision after this Court denied certiorari. *Fairchild*, 51 F.3d at 131 (ruling petitioner's "Motion for Recall of Mandate and for Rehearing is denied"). And in *Adamson v. Lewis*, 955 F.2d 614 (9th Cir. 1992), cast by respondent as merely a minority view, the court held that "[a]ny stay of mandate [after the denial of certiorari] would have to be justified upon the same grounds as would justify a recall of the mandate." *Adamson*, 955 F.2d at 620-21. (Resp. Br. 18 and n.9)

permitted to take advantage of a ministerial error in order to take action that would not have been permitted but for the error. If the latter, the Sixth Circuit's actions amount to nothing less than a calculated end-run around *Calderon* to reach an otherwise prohibited result. Neither type of manipulation should be condoned by this Court.

Moreover, even if the Court were to indulge the fiction that the Sixth Circuit was, in fact, engaged in informal "rehearing" of this case while respondent's petition for writ of certiorari was pending, non-compliance with Rule 41(d)(2)(D) still could not be justified. First, Rule 41(d)(1) only allows for an automatic stay of the mandate pending disposition of a *timely filed petition* for panel or en banc rehearing, an event which, in this case, occurred in March 2003 prior to the filing of the certiorari petition. (Pet. App. 346) That subsection is thus inapplicable here. And even if the general provision of Rule 41(b) allowing a court of appeals to "shorten or extend the time" for issuance of the mandate could be invoked in these circumstances, the language of the rule envisions that the court will issue an affirmative statement to that effect, which is obviously lacking in this case. *See also* Fed. R. App. P. 2 ("On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – *suspend any provision* of these rules in a particular case *and order proceedings as it directs*.") (emphasis added). Nor, as respondent suggests, should a litigant be required to divine a court's intentions from miscellaneous docket entries reflecting routine administrative activities of the court clerk's office, such as the transfer of an appellate record. (Resp. Br. 41) A court speaks only through its orders duly entered of record. *Transcontinental Leasing, Inc. v. Mich. Nat'l Bank Detroit*, 943 F.2d 52 (6th Cir. 1991) (where district court order

failed to extend appeal deadline, reviewing court will not infer an intent to extend from the language of a separate unrelated court order); *Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 741 F.2d 41, 44 (4th Cir. 1984) ("basic to the operation of the judicial system is the principle that a court speaks through its orders") (citing *Rothschild & Co., Inc. v. Marshall*, 44 F.2d 546 (9th Cir. 1930)). The Sixth Circuit's orders in this case say nothing about extending the stay of the mandate for any reason or for any period beyond the disposition of respondent's certiorari petition.

In the final analysis, neither party can provide this Court with anything more than speculation as to *why* the mandate "ha[d] not yet issued" when the Sixth Circuit chose to reconsider its earlier decision. But that task ought never fall to the parties in a judicial proceeding. In the absence of an express order to the contrary, parties should be able to presume that official ministerial acts will be performed as required by law. *See, e.g., United States v. Barela*, 571 F.2d 1108 (9th Cir. 1978) (Ferguson, District Judge, dissenting) (In accordance with the equitable principle that a "court may regard as done that which should have been done," where mandate not issued in accordance with Rule 41, matter should be considered by the appellate court under the same standard justifying a recall of the mandate.); *Sherard v. Nebraska*, 509 N.W.2d 194 (Neb. 1993) ("When the record is silent on the issue, we will presume that a mandate was duly issued at the appropriate time."). *See also Jacksonville Port Authority v. Adams*, 556 F.2d 52, 56 (D.C. Cir. 1977) ("In the interest of justice, the court may proceed as if the action that should have been taken in the courthouse was timely taken."). To permit a court of appeals to act surreptitiously in the face

of the unambiguous requirements of clearly applicable rules would be detrimental to the coherence and consistency that the rules of procedure, by their nature, are designed to provide.

B. The Issuance Requirement of Rule 41(d)(2)(D) Cannot Properly Be Read As Merely Discretionary.

Respondent's reading of Rule 41(d)(2)(D) as merely discretionary is equally unsupportable. He contends that, because subsections (b) and (d)(1) of Rule 41 both contain provisions giving the court of appeals discretion to deviate from the otherwise mandatory language of those sections, subsection (d)(2)(D) must also be read to allow that same discretion. Respondent's proposed reading, however, ignores some of the most fundamental rules of statutory construction. First, and most basic, where the statutory language is unambiguous with regard to the particular dispute in the case, the inquiry of a court must cease. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997). The question whether statutory language is plain is determined by the language itself, the specific context in which it is used, and the broader context of the statute as a whole. *Robinson*, 519 U.S. at 341. Here, the language of subsection (d)(2)(D) could not be any clearer – "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed." Because the circumstances of this case fall squarely within the parameters of Rule 41(d)(2)(D), the court had no discretion to take a different course except under such extraordinary circumstances as would justify further action by the court had the rule's

requirements been satisfied through the timely issuance of the mandate. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (rule's provision that the mandate issue on the denial of certiorari creates a "threshold requirement of exceptional circumstances before the mandate would be stayed"). That position is further buttressed by application of the principle that a specific statute, here subsection (d)(2)(D), controls over a general provision such as subsection (b), particularly when the two are interrelated and closely positioned, *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981), the specific provision qualifying and supplying exceptions to the general one. *Townsend v. Little,* 109 U.S. 504, 512 (1883). Thus, the mandatory issuance provision of section (d)(2)(D) governs under the specific circumstance of this case, where the mandate has been stayed pending the filing of a petition for writ of certiorari and for no other reason. Respondent's reliance on the general issuance provision of Rule 41(b) as the overarching guide for *when* a court of appeals must issue a mandate is misplaced. (Resp. Br. 16) As respondent himself concedes in his opening argument, "*if* the court of appeals has stayed issuance of the mandate for the reason that this Court may grant certiorari, then the clerk of a court of appeals must, upon receipt of the denial of certiorari, issue the mandate." (Resp. Br. 11)

Respondent's argument also ignores another established principle of statutory construction – that where language is included in one section of a statute but omitted in another section of the same statute, it is generally presumed that the disparate inclusion and exclusion was done intentionally and purposefully. *Russello v. United States*, 464 U.S. 16, 23 (1983). The rule's drafters clearly could have but did not confer upon the court of appeals the

discretionary authority to extend the stay of the mandate after the denial of certiorari, although such authority had been expressly provided for in other contexts in two sections of Rule 41. *See* Rule 41(b) ("The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *The court may shorten or extend the time.*") (emphasis added); Rule 41(d)(1) ("The timely filing of a petition for panel rehearing . . . stays the mandate until disposition of the petition or motion, *unless the court orders otherwise.*") (emphasis added). (Resp. Br. 20) The omission of equivalent language in subsection (d)(2)(D) is conspicuous and, indeed, constitutes powerful circumstantial evidence of the drafters' intent that an appellate court relinquish jurisdiction of an appeal when this Court denies certiorari.

It is the duty of the lower courts to respect and adhere to the governing rule of law. Indeed, it has been said that, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Missouri v. Jenkins*, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (quoting The Federalist No. 78, p. 528 (J. Cooke ed. 1961)). Through its rule-making authority, this Court may regulate the exercise of jurisdiction by a federal court in any manner not inconsistent with the Constitution or laws of the United States. *Venner v. Great Northern Railway Co.*, 209 U.S. 24, 35 (1908). Thus, any historical, inherent control a court of appeals may have over the issuance of its mandate merges into the express provisions

of the rules of appellate procedure and is limited to that extent.[4] *Cf. Matter of Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988) (holding that "old inherent power" of a bankruptcy court to reconsider its final judicial orders merged into the Rules of Civil Procedure). The choice here is not, as respondent suggests, between a "holistic" reading of Rule 41 on the one hand and, on the other, an unduly restrictive reading which abrogates the court of appeals' "inherent authority." It is a choice, instead, between recognizing or ignoring what the rule provides in plain language.

C. A Court of Appeals May Not Defeat the Finality of a Judgment Affirming the Denial of Habeas Corpus Relief Merely by Retaining Its Mandate in Violation of the Rules of Appellate Procedure.

Aside from respondent's flawed statutory construction arguments, his jurisdictional arguments largely miss the point. Petitioner has never contended, nor does his argument dictate, that a court of appeals is divested of

[4] Citing Justice Harlan's dissent in *United States v. Ohio Power Co.*, 353 U.S. 98 (1957), respondent contends that Congress' abolition of the End of Term Rule in 1948, by virtue of 28 U.S.C. § 452, left the federal courts with "untrammeled power in establishing their own rules of finality." *Ohio Power*, 353 U.S. at 103. (Resp. Br. 25) Yet the next sentence of that opinion supports petitioner's interpretation of Rule 41: "[T]he history of § 452 indicates that the courts were to have no power to re-examine their judgments otherwise than in accordance with their established rules or statutes." *Id.* Thus, even if an appellate court's power to establish its own rules of finality could be characterized as "untrammeled" following the enactment of § 452 in 1948, that power was subsequently curtailed by the enactment of the Federal Rules of Appellate Procedure, including Rule 41, which became effective July 1, 1968.

jurisdiction at the point Rule 41(d)(2)(D) requires issuance of the mandate. Rather, the mandatory language of Rule 41(d)(2)(D), triggered by the order denying certiorari, operates to limit the court's authority to reconsider its earlier decision beyond that point to those circumstances that would justify a recall of the court's mandate if it had been issued properly. The only way the Sixth Circuit was able to claim continued control over this case was by ignoring the issuance requirement of Rule 41(d)(2)(D) and retaining jurisdiction it was otherwise obligated to relinquish.

That a "mandate is effective when issued" under Rule 41(c) is no doubt true. It is, however, irrelevant to the question of finality when the mandate requires no further action in the receiving court. Until the mandate issues, any action in the *district court* is a nullity. *See, e.g., Zaklama v. Mount Sinai Medical Center,* 906 F.2d 645, 649 (11th Cir. 1990) ("[A] *district court* generally is without jurisdiction to rule in a case that is on appeal, despite a decision by this court, until the mandate has issued.") (emphasis added). However, and more to the point, the mandate of the Sixth Circuit is not directed to the State, and its issuance is not a necessary antecedent to the State's judicial processes.[5]

[5] Respondent's contention that issuance of the mandate is a necessary antecedent to a motion to set an execution date under Tennessee law is incorrect. (Resp. Br. 40-41) The Tennessee Supreme Court has never viewed the "completion of the standard three-tier appeals process" as requiring the issuance of a court of appeals' mandate, nor did respondent assert the court of appeals' failure to issue the mandate as "legal and/or factual grounds why . . . no execution date should be set" in his case. Tenn. Sup. Ct. R. 12.4(A). (Pet. App. 349-50) Moreover, contrary to respondent's suggestion, the Tennessee Supreme Court's denial of the State's motion for an execution date in *Alley v. Tennessee*, No. M1991-00019-SC-DPE-DD (Tenn., Jan. 6, 2005), was not

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Respondent's argument conflates the functions of a court's judgment with its mandate. The former adjudicates the rights of the parties; the latter is directed to the originating court, transferring jurisdiction with instructions for further proceedings. "A court of appeals' decision is 'final' from the issuance of the *judgment*, not from the issuance of the *mandate*. . . . [I]ssuance of the mandate is wholly separate from our consideration of the merits [and is] merely the formal vehicle for conveying the terms of our disposition to the District Court." *United States v. Clark*, 915 F.2d 699, 716 (D.C. Cir. 1990) (Edwards, C.J., dissenting) (emphases in original) (vacatur for mootness not required by events occurring subsequent to decision on the merits but before issuance of the mandate). Indeed, the function and effect of a mandate differ significantly depending upon the nature of the court's judgment. Where the judgment of the court calls for a remand of the cause to the trial court for further action, the judgment itself is not self-executing. Instead, it must be certified back to the district court by way of the mandate. Through the mandate, authority and jurisdiction is returned to the lower court to take such steps as are directed in the judgment. In that instance, issuance of the mandate is of institutional significance both for purposes of directing further litigation and in the allocation of jurisdiction among

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premised on the court of appeals' mandate, but instead on the potential for further review in Alley's case (through a timely petition for en banc rehearing in the Sixth Circuit) and the potential for further federal court rulings in the Rule 60(b) context "that could render ineffectual any date set." The court specifically noted the State's announcement of its intention to file a petition for writ of certiorari in *In re Abdur'Rahman*, Nos. 02-6547/6548 (6th Cir. Dec. 13, 2004) (en banc) (addressing the role of Rule 60(b) motions in the federal habeas context), which articulated the rule on which Alley's case was decided.

tribunals. *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) (Just as notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.). But where, as here, an appellate court judgment simply affirms an order of dismissal, issuance of the mandate has little, if any, practical significance. *See generally State v. Miyasato*, 805 So.2d 818 (Fla. Dist. Ct. App. 2001) (discussion concerning purpose and effect of appellate court mandate).

Nor was the State barred from proceeding in the state courts on the basis of the district court's extension of its stay of execution pending appeal under 28 U.S.C. § 2251. (Resp. Br. 40-41; J.A. 88-89) When the Sixth Circuit affirmed the district court's judgment dismissing respondent's petition for writ of habeas corpus and then denied rehearing of that decision, the stay of execution dissolved by operation of law. In *Lambert v. Barrett*, 159 U.S. 660 (1895), this Court held that, when a habeas corpus appeal was dismissed, "the supersedeas fell with the disposition of the case," and when final judgment was entered, the State had the power to proceed even before the Court's mandate was properly filed with the lower federal court. *See also Jugiro v. Bush*, 140 U.S. 291, 295-96 (1891) (interpreting statute authorizing stay of State proceedings "pending appeal," Court declined to "superadd" the condition that the filing of the mandate in the circuit court, which merely affirmed its judgment refusing the writ of habeas corpus, is necessary before a State can proceed in the execution of its judgment of conviction). Were it not so, the Sixth Circuit would not have seen fit to enter *sua sponte* another stay of execution in conjunction with its second opinion withdrawing its initial judgment. (Pet. App. 6)

Likewise, petitioner's motion for reconsideration of the court's order expanding counsel's appointment to include state-court conservatorship proceedings provides no justification for the failure of the mandate to issue under Rule 41(d)(2)(D). (Resp. Br. 41-42; J.A. 7) First, the state-court proceeding at issue in that motion was separate and distinct from respondent's habeas corpus appeal, in general, or the judgment of the Sixth Circuit, in particular, and was actually concluded in October 2003 through the termination of respondent's state-court-ordered conservatorship, an occurrence specifically noted by the Tennessee Supreme Court in its May 12, 2004, decision affirming the trial court's summary dismissal of respondent's petition asserting incompetence for execution. (Pet. App. 370-71) More importantly, however, the Sixth Circuit's actions in this case cannot be justified by its failure to dispose of that motion in a timely manner.

II. THE PRINCIPLES OF COMITY AND FINALITY UNDERLYING THIS COURT'S DECISION IN *CALDERON* REQUIRE REVERSAL OF THE SIXTH CIRCUIT'S JUDGMENT.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court affirmed the general principle that a court of appeals' authority to review a state criminal judgment in a habeas corpus proceeding is limited to one round of review unless necessary to prevent a miscarriage of justice. Respondent's reading of *Calderon* as holding that a court of appeals' judgment in a habeas corpus case is not "final" until issuance of the mandate is mistaken. The only issues directly before the Court in *Calderon* involved the existence, source, and extent of a court of appeals' authority to *recall* a mandate in order to revisit the merits of an earlier decision. *Calderon*, 523 U.S. at 541. In *Calderon*, the

mandate itself, duly issued in accordance with the rules of appellate procedure, was indisputable evidence of the finality of the court's judgment. *Calderon*, 523 U.S. at 551 ("We denied Thompson's petition [for writ of certiorari] on June 2, 1997. . . . The Court of Appeals issued its mandate on June 11, 1997."). Thus, it was unnecessary for the Court in *Calderon* to address the precise finality question presented here – whether a court of appeals may fail to issue its mandate as required by law and then assert its control of the mandate as a basis to reconsider a final judgment. But the Sixth Circuit's action in this case is plainly irreconcilable with the principle underlying the decision in *Calderon*: in the federal habeas context, once a state prisoner has received a full review of his constitutional claims by a court of appeals and this Court has denied certiorari, the State's interest in "real finality" outweighs the prisoner's interest in obtaining yet another opportunity for review. *Calderon*, 523 U.S. at 557.

As in *Calderon*, the court here did not act merely to correct a clerical error in its initial judgment. The Sixth Circuit's second decision was a complete reversal of the first on the merits. Nor does this case involve any fraud upon the court. The Sixth Circuit itself rejected that notion. (Pet. App. 2) Moreover, as the panel majority plainly acknowledged, this case does not present a situation where new evidence comes to the attention of the court after entry of its initial judgment: "Reading Judge Suhrheinrich's opinion, one might conclude that this court had only recently unearthed the Sultan deposition, when in fact it was submitted to the panel prior to oral argument as part of the abeyance motion." (Pet. App. 3) Indeed, the Sultan deposition – touted by both respondent and the Sixth Circuit as being "extremely probative" and of "critical" evidentiary significance (Pet. App. 2, 9; Resp. Br. 11) –

had been before the court for *21 months* prior to entry of its initial judgment.[6] The Sixth Circuit actually noted the existence of the deposition in a footnote in its original opinion. (Pet. App. 144 n.13) And respondent quoted directly from the Sultan deposition in his petition for rehearing and suggestion for rehearing en banc, noting specifically that, within the report and deposition, "Dr. Sultan made specific findings related to Thompson's mental condition at the time of the offense." (*Thompson v. Bell*, 6th Cir. Case No. 00-5516, Petition for En Banc Rehearing, pp. 29-30, filed January 27, 2003) Despite that knowledge, the Sixth Circuit nevertheless denied rehearing on March 10, 2003. (Pet. App. 346; J.A. 6)

The court's actual justification for its surprise eleventh-hour decision is really indiscernible. Judge Suhrheinrich, who "wish[ed] it to be known that the initiative for this decision came from [his] chambers," (Pet. App. 8) asserted that the Sultan deposition came to the court's attention *after* issuance of its initial decision, thus necessitating post-judgment action: "Subsequent to the issuance of our decision on January 9, 2003, information has come to the attention of the Court which requires us to determine whether our decision to affirm the district court's denial of Thompson's petition for writ of habeas corpus relief from his death sentence was improvident." (Pet. App. 7-8) However, assuming that this assertion refers to the Sultan deposition, both the majority opinion and the record conclusively refute it. And it is impossible to

[6] The Sultan deposition initially came before the Sixth Circuit on March 2, 2001, as an attachment in support of a motion to hold the appeal in abeyance pending disposition in the district court of a motion under Fed. R. Civ. P. 60(b), which the Sixth Circuit denied on March 21, 2001. (J.A. 5)

reconcile with footnote 13 of the court's earlier opinion (also authored by Judge Suhrheinrich), which specifically referred to the Sultan deposition in its discussion of respondent's Rule 60(b) motion in the district court (Pet. App. 144 n.13), and footnote 10 of the second opinion (Pet. App. 55 n.10), noting that the Sultan deposition was attached to respondent's contemporaneous motion to hold his appeal in abeyance pending disposition of the Rule 60(b) motion.[7]

The court's analysis of the probative value of the Sultan deposition is equally muddled. Although both the majority and concurring opinions point to Dr. Sultan's opinion concerning respondent's "mental state at the time of the crime" as critical to the court's disposition of the case (Pet. App. 2, 7), neither ultimately faults trial counsel for failing to present *that* evidence at sentencing. In fact, neither the majority nor the concurring opinion questions the state court's conclusion that counsel's trial strategy regarding the presentation of mental health evidence was entirely reasonable under *Strickland v. Washington*, 466 U.S. 668 (1984). That is hardly surprising given the fact that respondent had undergone a thirty-day mental health evaluation prior to trial at Middle Tennessee Mental Health Institute, which resulted in a finding of "no mental illness, mental defect, or insanity," and respondent did not even receive a pre-trial diagnosis of mental illness from

[7] Judge Suhrheinrich takes issue with the majority's concession regarding the availability of the Sultan deposition by arguing that it had not been "properly placed" before the court prior to issuance of its initial decision, thus precluding exercise of the court's "equitable powers" at that time. (Pet. App. 114) The obvious flaw in that reasoning is that the court of appeals lacked any justification for considering the Sultan deposition on either occasion.

his own mental health expert. (Pet. App. 158) As the state court reasonably concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion," a finding that was duly noted in the Sixth Circuit's initial opinion. (Pet. App. 164) Rather, Judge Suhrheinrich faults counsel's failure to present a complete *social and family history* of the respondent for use in mitigation. (Pet. App. 85-86) But the three individuals cited by Judge Suhrheinrich as providing the most critical background information – Maybelle Lamar (respondent's grandmother), Nora Jean Hall Wharton (respondent's sister), and Arlene Cajulao (respondent's former girlfriend) – actually testified at respondent's capital sentencing hearing in 1985. (R.1, Add. 1H, Vol. 17, pp. 73-100; Vol. 18, pp. 2-32, 50-97)

Ultimately, however, Judge Suhrheinrich did not condemn the state court's denial of post-conviction relief based upon any supposed deficiency in the state court's assessment of counsel's performance in light of this Court's precedent but upon an alleged deficiency in the state post-conviction process itself, a basis that is not even cognizable in federal habeas proceedings – "the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1)." (Pet. App. 89) *See Pennsylvania v. Finley*, 481 U.S. 551, 558-59 (1987) (Any claim of error arising out of state post-conviction review is a matter for state, rather than federal court, determination.). In fact, none of the members of the panel below attempts to explain how consideration of the Sultan deposition could possibly have defeated summary dismissal of respondent's federal habeas petition even if it had properly been presented to the district court.

In short, the Sixth Circuit's rationale for its actions in this case is untenable under any of the various theories advanced by either the majority or concurring opinions. Under any standard, those actions would constitute a grave abuse of discretion. This case simply does not present a situation in which a court of appeals has properly exercised its rehearing authority under Rules 35 or 40 or has stayed its mandate prior to the denial of certiorari for some other legitimate reason. Rather, the Sixth Circuit's actions in this case call to mind the concern voiced by Justice Harlan in his dissenting opinion in *Ohio Power*: "I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed in this Court." 353 U.S. at 111.

III. REMAND TO THE SIXTH CIRCUIT IS UNNECESSARY BECAUSE THE EVIDENCE ON WHICH ITS DECISION IS BASED IS INSUFFICIENT AS A MATTER OF LAW TO DEMONSTRATE A MISCARRIAGE OF JUSTICE SO AS TO JUSTIFY A SECOND ROUND OF HABEAS REVIEW.

Respondent argues that, even if this Court concludes that *Calderon* applies, it should remand the case to the Sixth Circuit either for application of the *Calderon* standard or to determine whether a fraud has been committed on the court. (Resp. Br. 49) The latter option has already been foreclosed by the panel decision specifically rejecting the minority position urging intervention on grounds of a fraud upon the court. (Pet. App. 2, 82, 89-107) Respondent did not cross-petition for certiorari review of that decision,

and he is now barred from challenging it. Sup. Ct. Rules 12 and 13. As to application of the *Calderon* standard, nothing will be gained by remanding this case to the court of appeals with instructions for the court to perform the analysis it should have performed in the first place because the evidence is insufficient as a matter of law to demonstrate a miscarriage of justice. (Br. 35-43) All that a remand for further consideration will accomplish is additional needless delay and yet another unjustified obstacle to the State's ability to execute its lawful judgment.

CONCLUSION

For the reasons stated, the Sixth Circuit's judgment should be reversed.

Respectfully submitted,

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No. 04-514

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IN THE

Supreme Court of the United States

RICKY BELL, Warden,

Petitioner,

vs.

GREGORY THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Federal Rule of Appellate Procedure 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

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IN THE

Supreme Court of the United States

RICKY BELL, Warden,

Petitioner,

vs.

GREGORY THOMPSON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

CJLF has appeared as *amicus curiae* in this Court in many cases implementing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), including *Calderon* v. *Thompson*, 523 U. S. 538 (1998). We have sought to have this

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

Act implemented and enforced as Congress intended, opposing the numerous attempts to evade and sabotage it.

This case involves yet one more such attempt. When this Court denied certiorari in Gregory Th ompson's federal habeas case, that should have been the end of federal review, unless he could qualify for the very narrow exception provided by Congress for successive petitions. Instead, the Sixth Circuit gave him the very "second bite at the apple" that Congress intended to reserve for the actually innocent. It did so by manipulating the mandate in a manner unheard of in habeas practice prior to AEDPA, but which is now becoming routine. This evasion of the clear intent of Congress is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Twenty years ago, Brenda Lane went shopping at a Wal-Mart store in Shelbyville, Tennessee. Gregory Thompson abducted her at knifepoint and forced her to drive to a remote location. There he stabbed her, ran over her with her own car, and left her. He drove her car to Marietta, Georgia, where he set it on fire. See *State* v. *Thompson*, 768 S. W. 2d 239, 243 (Tenn. 1989). There is no doubt whatever in this case of Thompson's identity as the perpetrator. He was cited for speeding while driving Mrs. Lane's car on Interstate 24, on the way back to Georgia. After his arrest, he confessed and told the police where to find Mrs. Lane's body. See *ibid.*

Thompson had no defense at the guilt phase and was convicted. See *id.*, at 244. At the penalty phase, defense counsel presented background evidence and the testimony of a clinical psychologist. The prosecution rebutted with its own psychologist who presented substantial evidence of malingering. The jury found three aggravating circumstances (torture or depravity, avoiding arrest, and felony murder) and imposed the death penalty. See *ibid.* On direct appeal, the Tennessee Supreme Court reviewed Thompson's claims of

ineffective assistance of counsel, among others, and affirmed. See *id.*, at 244-253.

In 1990, Thompson filed a petition for postconviction relief. After several years and an evidentiary hearing, the trial court denied relief. The Court of Criminal Appeals affirmed, rejecting ten claims: four on the merits, four as previously adjudicated, and two as defaulted. See *Thompson* v. *State*, 958 S. W. 2d 156, 159-160 (1997). The Court considered multiple allegations of ineffective assistance not already resolved on direct appeal, including mental claims that Thompson's head injuries had not been sufficiently investigated and presented. The court found both prongs of the ineffective assistance test missing: no deficient performance because counsel reasonably relied on the opinions of two experts, and no prejudice because Thompson had not demonstrated that he actually did have brain damage. *Id.*, at 165. The Tennessee Supreme Court denied discretionary review of this decision.

On June 12, 1998, Thompson filed a petition with the Federal District Court. See Pet. for Cert. 3. The District Court authorized discovery, including depositions of Thompson's experts, Dr. Faye Sultan and Dr. Barry Crown. See *Thompson* v. *Bell*, 315 F. 3d 566, 582-583 (CA6 2003). On February 12, 1999, Thompson filed a motion with an affidavit by Dr. Sultan, but that affidavit expressed no opinion regarding Thompson's mental state at the time of the crime. See *id.*, at 583, n. 13.

Dr. Sultan wrote a report, dated July 22, 1999, in which she opined that Thompson had schizoaffective disorder, bipolar type and was suffering from that illness at the time of the offense. See *Thompson* v. *Bell*, 373 F. 3d 688, 717-718 (CA6 2004) (Suhrheinrich, J., concurring in part and dissenting in part). Counsel for the warden took Dr. Sultan's deposition the same day. See *ibid.*

The warden moved for summary judgment, and neither party submitted the Sultan materials. See *id.*, at 690 (majority opinion). The District Court granted summary judgment for the

warden on February 17, 2000. While the appeal was pending, Thompson filed a Rule 60(b) motion in the District Court to supplement the record with the Sultan materials and attached the same materials to a motion in the Court of Appeals to hold the appeal in abeyance pending the 60(b) motion. See *ibid.* The District Court denied the 60(b) motion. Pet. for Cert. 4. Although actually aware at this point that the Sultan materials were not part of the record, counsel for Thompson did not ask the Court of Appeals to supplement the record itself or review the District Court's refusal to do so. See Docket, *Thompson* v. *Bell*, USCA 6, No. 00-5516 (no such motion in the docket). The Court of Appeals chose not to consider the Sultan deposition, because it was not part of the appellate record. 373 F. 3d, at 690.

The Court of Appeals affirmed denial of summary judgment, finding no genuine issue of material fact. See 315 F. 3d, at 595. Judge Moore concurred in the result, also based on lack of evidence, see *ibid.*, and Judge Clay dissented. See *id.*, at 596.

On petitioner's motion, the Court of Appeals stayed the mandate, pending certiorari. Pet. for Cert. 4. On December 1, 2003, this Court denied certiorari. Thompson immediately requested and received a further stay to file a petition for rehearing in this Court and "thereafter until the Supreme Court disposes of the case." Pet. for Cert. 5. No further stays of the mandate were requested or granted. This Court's denial of rehearing was filed in the Court of Appeals on January 23, 2004. Despite the clear wording of Federal Rule of Appellate Procedure 41(d)(2)(D) and the last stay order, the mandate did not issue. The state proceeded with setting an execution date and determining competency to be executed. Pet. for Cert. 5-6.

Without notice to the state or an opportunity to be heard, Judge Suhrheinrich conducted his own review of the record. See 373 F. 3d, at 692-693 (Suhrheinrich, J., concurring in part and dissenting in part); cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). Six months after this

Court's denial of rehearing on the certiorari petition, the Court of Appeals issued an opinion *sua sponte* supplementing the record, reconsidering its affirmance based on the additional information, vacating the District Court's judgment, and remanding for an evidentiary hearing. This Court granted certiorari on January 7, 2005.

SUMMARY OF ARGUMENT

Continued litigation of the original habeas petition after this Court's denial of certiorari was nearly unheard of before AEDPA. Now it has become routine as a way to evade Congress's strict limit on successive petitions. A study of Ninth Circuit cases by CJLF shows that in seven of the last twelve cases, there was significant litigation of the original petition after denial of certiorari.

Reconsideration of the first petition alters the balance of interests sharply from the one determined by Congress. In enacting AEDPA, Congress determined that capital cases routinely dragged on too long after the normal end of the first federal petition. Although in this case, as in *Calderon* v. *Thompson*, the successive petition limit does not apply directly, the "objects of the statute" still guide the courts in their exercise of discretionary powers.

Post-certiorari stay of the mandate and further reconsideration should be governed by the limits for recall of the mandate established in *Calderon* v. *Thompson*. A more stringent standard would result in the absurdity of issuing a mandate and immediately recalling it. Any less stringent standard would authorize widespread evasion of AEDPA. Congress has decided which habeas petitioners will get more than one "bite at the apple" and which will not. In so deciding, Congress has balanced the state's interest in finality against the petitioner's interest in preventing a miscarriage of justice. As this Court noted in *Lonchar* v. *Thomas*, courts must not

undermine that balance through the use of "background" powers.

ARGUMENT

I. Post-certiorari litigation in the original habeas case has become routine as a method of evading AEDPA's successive petition limits.

In *Griffith* v. *Kentucky*, 479 U. S. 314, 321, n. 6, (1987), this Court defined a "final" case in the context of the direct review process as one where "the availability of appeal [has been] exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." See also 28 U. S. C. § 2244(d)(1)(A) ("final" for statute of limitation purposes). Of course, a criminal case is not truly final in the ordinary sense of that word until the collateral reviews are also final. The present case, like *Calderon* v. *Thompson*, 523 U. S. 538 (1998), deals with the question of when the initial federal habeas petition can be considered final.

The answer, at least in all but the most extraordinary cases, should be the same as *Griffith*'s standard for direct review. That is, denial of certiorari by this Court, or the expiration of time to request it, should normally be the end of the line as to that proceeding. Further proceedings, such as successive petitions, may be available if and when Congress has decided that the benefits of permitting them outweigh the costs, but the initial habeas should be over.

And so it was, prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Recall of mandate by Courts of Appeals was so rare that some Justices doubted whether such a power even existed. See *Calderon*, 523 U. S., at 549-550 (citing *United States* v. *Ohio Power Co.*, 353 U. S. 98, 102-103 (1957) (Harlan, J., dissenting)). Although Courts of Appeals are clearly authorized to stay their mandates pending certiorari, see Fed. Rule App. Proc. 41(d)(2) (cited below as "Rule 41"), such a stay was rarely requested before

Calderon. The normal mechanism for further federal review was the successive petition.

To see how things have changed, *amicus* CJLF studied all of the cases from the Ninth Circuit that have proceeded to execution from 1998 through January 2005, excluding so-called "volunteers." We retrieved the dockets through the on-line Pacer system,[2] and examined them for issuance of the mandate and for further litigation after this Court's denial of certiorari. The results are described in Appendix A.

In the first seven cases (*Calderon* v. *Thompson* is the fifth), we see that the petitioner did not ask for the mandate to be stayed before filing the certiorari petition, in accordance with usual pre-AEDPA practice. In the first four cases, we see one application for leave to file a successive petition (the mechanism provided by Congress), two attempts to file successive petitions without leave, and one motion under Federal Rule of Civil Procedure 60(b).[3] In July 1997, Thompson's lawyers hit on the idea of a motion to recall the mandate as a way around the successive petition limit, resulting ultimately in this Court's decision on April 29, 1998.

The *Gillies* and *Gerlaugh* cases were already in their late stages when *Calderon* v. *Thompson* was decided, and their counsel apparently decided to seek other ways around AEDPA's limits. They both filed civil rights suits and original habeas petitions in appellate courts, ultimately unsuccessfully.

In the remaining twelve cases, we see that continuing to litigate the original habeas case after this Court's denial of certiorari has now become routine. Siripongs, Vickers, Michael Poland, and Chaney all moved to recall the mandates, despite the high standard set by this Court in *Calderon*. In *Vickers*, this

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2. The reason for cutting off the study at 1998 is that dockets for most older cases are not available on-line.

3. This maneuver is the subject of another case this Term, *Gonzalez* v. *Crosby*, No. 04-6432.

motion was considered seriously enough to hold a telephonic oral argument on it. Ortiz tried the Rule 60(b) gambit, to be considered further in *Gonzalez*.

Five of the inmates did not attempt further litigation on the original petition. The LaGrand brothers filed successive petitions without meeting the AEDPA standard, and were granted relief by the Ninth Circuit, requiring this Court's intervention twice. See *Stewart* v. *LaGrand (Karl)*, 525 U. S. 1173 (1999); *Stewart* v. *LaGrand (Walter)*, 526 U. S. 115 (1999). Babbitt and Poland tried original writs in this Court, as well as certiorari petitions on their successive habeas petitions, even though such petitions are expressly forbidden by 28 U. S. C. § 2244(b)(3)(E). Only Darrell Rich did not attempt an end-run. His civil suit did not attempt to prevent the execution, but was on another matter.

The last two cases show how post-certiorari stay of the mandate is being used to evade the intent of Congress in capital litigation today. In *Anderson*, petitioner requested and received a stay of the mandate pending a petition for certiorari. The day after this Court's conference on Anderson's certiorari petition, but before denial was formally announced, Anderson moved in the Court of Appeals to renew the rehearing petition denied over five months earlier and to continue the stay of the mandate. The panel denied the motion, but the Court of Appeals considered it en banc. The mandate finally issued five weeks after denial of certiorari, rather than "immediately." Cf. Rule 41(d)(2)(D).

Most disturbing is the recently concluded *Beardslee* case. Again, the petitioner requested and received a stay of the mandate pending certiorari. He requested a further stay on the day certiorari was denied, and received it. The Court of Appeals stayed the mandate again after this Court denied rehearing, this time to reconsider the *certificate of appealability*, a procedure Congress intended for the *beginning* of the appellate process, not the end. See 28 U. S. C. § 2253(c).

Oral argument was held on this motion, then more briefing, then another oral argument. The panel issued a supplemental opinion, which petitioner promptly followed with yet another petition for rehearing and rehearing en banc, followed by yet another certiorari petition when that was denied. A civil suit was litigated concurrently with all this, ending in another certiorari petition.

These are cases of clearly guilty murderers with undoubtably true death-eligibility circumstances. See *People* v. *Anderson*, 52 Cal. 3d 453, 465, 801 P. 2d 1107, 1111-1112 (1990) (caught red-handed in burglary/murder of elderly woman); *People* v. *Beardslee*, 53 Cal. 3d 68, 85, 806 P. 2d 1311, 1317-1318 (1991) (defendant testified to killing two women); Cal. Penal Code §§ 190.2(a)(3), (a)(17)(G) (multiple murder and burglary-murder). That is, there is no genuine question in either case that the judgment is not a miscarriage of justice as defined in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992) and *Schlup* v. *Delo*, 513 U. S. 298 (1995). Yet the proceedings have come to resemble the situation before AEDPA, and even before *McCleskey* v. *Zant*, 499 U. S. 467 (1991).

In seven of the last twelve cases, between post-certiorari proceedings to stay or recall the mandate and Rule 60(b) motions, there was substantial litigation on the original habeas petition after this Court's denial of certiorari. The denial of habeas relief is reconsidered as a matter of course, and the state must devote its resources to rebriefing and rearguing the same case it has already successfully defended many times, diverting resources from other cases in the pipeline.

The question before the Court is whether this reversion to the *status quo ante* is consistent with the spirit and intent of AEDPA, and, if not, whether the use of general powers to defeat Congress's specific intent is legitimate.

II. Reconsideration of the first petition alters the balance of interests sharply from the one determined by Congress.

A. Successive Petitions and AEDPA.

Of all the problems in capital habeas litigation prior to AEDPA, none cried out for reform more loudly than the abuse of the writ by repeated petitions. This is the area where Congress was most emphatic in its determination to curtail abusive practices. The exemplar of abuse was the Ninth Circuit's notorious mishandling of the case of Robert Alton Harris.

In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), this Court tightened the restrictions on successive petitions by adopting the cause-and-prejudice/actual innocence standard from the procedural default cases, replacing the "deliberate abandonment" standard. See *id.*, at 490, 493-494. It was widely believed that this tightening of the standard would curtail the abuse of successive petitions and allow most cases to proceed to execution reasonably soon after the decision on appeal of the first federal habeas petition. Indeed, *amicus* CJLF proposed this standard to the *McCleskey* Court, see *id.*, at 523, n. 10 (Marshall, J., dissenting), in the belief that it would strike the appropriate balance. Regrettably, the *Harris* case would soon demonstrate that stronger medicine was needed.

Eleven years after his conviction and sentence for a double murder, Robert Alton Harris filed his *third* federal habeas petition. See *Harris* v. *Vasquez*, 949 F. 2d 1497, 1500 (CA9 1991). Four months after *McCleskey*, a panel of the Ninth Circuit affirmed denial of habeas relief, based on *McCleskey* as well as other grounds. See *id.*, at 1501. Yet justice in this case, already long overdue, was further delayed by a blizzard of filings at every level of the federal courts, on top of state proceedings. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 321-326 (1992). The Ninth Circuit and its judges issued three stays,

see *id.*, at 324, which were vacated by this Court in *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-766) and *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992) (*per curiam*). An individual circuit judge issued yet another stay after Harris was already in the gas chamber, resulting in this Court's extraordinary order that the lower federal courts would issue no further stays. See *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-768).

The outrage from this debacle reverberated across the nation. As the various habeas reform bills moved through Congress, supporters of reform repeatedly cited *Harris* as the prime example of what was wrong with the system. See 141 Cong. Rec. 4107-4108 (1995) (statement of Mr. Cunningham); *id.*, at 4111-4113 (statement of Mr. Cox); *id.*, at 9304, col. 2-3 (statement of Sen. Specter); *id.*, at 14734, col. 1 (statement of Sen. Feinstein); *id.*, at 15019, col. 2 (statement of Sen. Specter); 142 Cong. Rec. 4610, col. 1 (1996) (statement of Mr. Hyde); *id.*, at 7562, col. 3 (statement of Sen. Feinstein); *id.*, at 7798, col. 2-3 (statement of Sen. Specter); *id.*, at 9462, col. 2 (statement of Sen. Abraham).

Although other parts of the habeas reform were highly controversial, there was broad, bipartisan consensus that strong measures were needed on successive petitions. Senator Biden, the principal opponent of the "deference" standard of 28 U. S. C. § 2254(d), agreed that "strict" limits on successive petitions were in order. See 141 Cong. Rec. 15047, col. 3 (1995).

The result is the stringent standard of 28 U. S. C. § 2244(b). Under paragraph (1), reconsideration of a previously litigated claim is absolutely prohibited with no exceptions. Under paragraph (2), a new claim may be considered only if it is either a new rule, retroactive on habeas corpus, or if it is based on facts both newly discovered *and* clearly refuting guilt of the underlying offense. Miscarriage of justice in the sense of *Schlup* v. *Delo*, 513 U. S. 298 (1995), innocence of the offense, is no longer enough by itself, and the *Sawyer* v. *Whitley*, 505

U. S. 333 (1992) standard of ineligibility for the death penalty has been completely abrogated.

In some of the pre-AEDPA cases, "successive" claims referred to reassertion of previously adjudicated claims, while "abuse of the writ" referred to inexcusable assertion of new claims after the first petition. See *Sawyer*, 505 U. S., at 338. However, Congress copied the term "second or successive petition" from former Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), where it referred to any petition after the first, whether the grounds were new or repeated.[4] Section 2244(b)(1) deals with the claims previously termed "successive," while (b)(2) deals with the "abusive" claims.

Taken literally, the term "second or successive" would apply to any petition after the first, regardless of the reason for disposition of the first. However, this Court has applied the statute to further its purpose, and not literally. The purpose was to limit habeas petitioners, particularly in capital cases, to "one bite of the apple."

> "By imposing filing deadlines on all death row inmates, and by limiting condemned killers convicted in State or Federal court to one Federal habeas petition—*one bite of the apple*—these landmark reforms will go a long, long way to streamline the lengthy appeals process and bridge the gap between crime and punishment in America.
>
> "It is dead wrong that we must wait 8, or 9, or even 10 years before a capital sentence is actually carried out. And, of course, it is terribly unjust to the innocent victims of violent crime and their families." 141 Cong. Rec. 15095, col. 1-2 (1995) (statement of Sen. Dole) (emphasis added); see also *id.*, at 15048, col. 2 (statement of Sen. Biden).

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4. Section 2244, as amended by AEDPA, made the prior Rule 9 unnecessary, and it was amended effective Dec. 1, 2004, to be little more than a cross-reference to § 2244(b).

When claims or petitions have been dismissed as unripe or unexhausted, there has been no bite, and hence the second petition is treated as a first. See *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644-645 (1998); *Slack* v. *McDaniel*, 529 U. S. 473, 486-487 (2000).

B. Successive Petitions and Post-Certiorari Reconsideration.

The present case is the mirror image of *Slack* and *Martinez-Villareal*. While those petitioners came within the literal terms of a "second" petition, they had not received the one bite at the apple that Congress intended to provide. In this case, as in *Calderon*, the petitioner does not come within the literal terms of § 2244(b), yet he has obtained the second bite at the apple that Congress intended to preclude.

Part III-A of *Calderon* v. *Thompson*, 523 U. S. 538, 553-554 (1998), lays down the ground rules for the direct application of § 2244(b) to a recall of the mandate. In this part of *Calderon*, there is no apparent reason to distinguish the recall of the mandate in that case from the failure to issue it and reconsideration of the merits. If motions to recall the mandate were not subject to the statute, "petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.*, at 553. That is precisely what happened in the *Anderson* and *Beardslee* cases, described in Part I, *supra*, at 8-10. By obtaining a stay of the mandate pending certiorari, and then further delay after Rule 41(d)(2)(D) required issuance, the petitioners in those cases achieved the relitigation and delay that § 2244(b) forbids.

Under *Calderon*, the statute applies directly whenever (1) the reconsideration is "pursuant to a prisoner's 'application,' " as opposed to *sua sponte*, or (2) whenever the reconsideration is based on new claims or evidence, "irrespective of whether the court characterizes the action as *sua sponte*." 523 U. S., at 554.

In the present case, the Court of Appeals characterized its action as *sua sponte* and the supporting evidence was presented to that court well before its initial decision of the case. See *Thompson* v. *Bell*, 373 F. 3d 688, 689-690 (CA6 2004). Under *Calderon*, then, the statute does not apply directly, and that presumably is why this Court's grant of certiorari was limited to Question 2, abuse of discretion, not Question 1, violation of § 2244(b). That does not, however, render the statute irrelevant.

> "Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute. In a habeas case, moreover, the court must be guided by the general principles underlying our habeas corpus jurisprudence. We now consider those principles as applied to this case." *Calderon*. 523 U. S., at 554.

III. Continued stay of the mandate and further reconsideration after denial of certiorari should be subject to the same limits as recall of the mandate.

By its terms, Rule 41(d)(2)(D) makes no exception to its imperative for issuance of the mandate immediately upon denial of certiorari. This is in contrast to the express provisions for the court of appeals to change the usual issuance times in subdivisions (b) and (d)(1). Under standard principles of construction, the presence of this authority in two subdivisions and absence in the third should be understood to mean there is no authority to continue the stay after denial of certiorari. See, *e.g.*, *Lindh* v. *Murphy*, 521 U. S. 320, 327 (1997). However, since *Calderon* recognized a power to recall mandates already issued, it would be absurd to issue a mandate only to immediately recall it. To avoid the absurdity, Rule 41(d)(2)(D) must be understood to implicitly authorize continued stay of the mandate under the same circumstances that would justify a recall.

To be sure, there are some factual differences between *Calderon* v. *Thompson*, 523 U. S. 538 (1998) and the present case. In that case, the mandate had actually issued. See *id.*, at 556. In the present case, the events prescribed by rule for the mandate to issue had occurred, and there was no order for further stay in effect, but the mandate had not actually issued. Hence, further proceedings were not undertaken in reliance on an actually issued mandate. Cf. *id.*, at 556-557. Yet in many other ways, the cases are similar. Lengthy federal proceedings have run their normal course, these followed extensive state proceedings at trial, on appeal, and on state collateral review, and the state was proceeding to execute its judgment in the well-founded belief that the federal habeas proceeding was over. Cf. *id.*, at 556.

In the present case, as well, we can put to one side two variations on the theme that were not involved in *Calderon* and not involved here. This case does not involve correction of a clerical error. Cf. *id.*, at 557. Notwithstanding the intensity of the concurring opinion in the Court of Appeals, this case also does not involve a fraud on the court. The majority held it did not, see *Thompson* v. *Bell*, 373 F. 3d 688, 690 (CA6 2004), and Thompson did not cross-petition for review of that ruling. This appears to be a garden variety error by habeas counsel, see *ibid.*, which is not cause for relief from a procedural default, even when it amounts to ineffective assistance. See *Coleman* v. *Thompson*, 501 U. S. 722, 754 (1991).

Calderon did not limit its rule to the particular facts of that case. The rule it established applies to all cases where "a court of appeals recalls its mandate to revisit the merits of its earlier decision . . . ." 523 U. S., at 557. The key consideration in finding "the State's interests in finality are all but paramount" was that "[t]he prisoner has already had extensive review of his claims in federal and state courts." *Ibid.*

When Congress adopted AEDPA, it struck a balance between finality and ensuring full review of the prisoner's claims. Congress rejected a plan to give state court decisions

the same preclusive effect as District of Columbia court decisions, thereby keeping the federal habeas route open. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945-946 (1998); see also *Swain* v. *Pressley*, 430 U. S. 372, 382-383 (1977). At the same time, though, it enacted the "deference" standard of 28 U. S. C. § 2254(d) and the limit on successive petitions in § 2244(b).

The deference standard represents Congress's policy decision regarding the appropriate balance on the first federal petition in its normal course. The successive petition rule, together with the statute of limitations in § 2244(d), represent Congress's policy decision on the reconsideration of previously litigated claims and the consideration of claims raised late. "[T]he balancing of interests undertaken by Congress . . . [is one] which courts may not undermine through the exercise of background equitable powers." *Lonchar* v. *Thomas*, 517 U. S. 314, 327 (1996).

Predictably, the enactment of AEDPA was met with calls to circumvent it by those who disagree with Congress's assessment of the costs and benefits of relitigation. One law review article lauds "creative ways to avoid the strictures of the AEDPA" and "hold[s] out the possibility of retaining some of the flexibility lost with the enactment of AEDPA." Hack, The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996, 30 Am. J. Crim. L. 171, 221, 223 (2003). This is quite simply a call for judicial sabotage of Congress's policy choice. The "flexibility" sought to be restored is the relitigation and delay that Congress sought to limit to a few, rare cases.

In implementing its policy choices, Congress did not scour the rules and practices of courts to hermetically seal every loophole that might be employed to defeat those choices. The Court would set a dangerous precedent if it required Congress to resort to such extremes in order to achieve its objectives. If scorched-earth legislation is what it takes to strike the balance where Congress chooses to strike it, such legislation may be

forthcoming. For example, Congress abolished the restrictive "end of term" rule in 1948, see 28 U. S. C. § 452, the effect of which "was to leave the federal courts untrammeled in establishing their own rules of finality." *United States* v. *Ohio Power Co.*, 353 U. S. 98, 103 (1957) (Harlan, J., dissenting). If that power is used to defeat Congress's policy choices, such restrictive rules may return.

One round of federal review, with deference to the state court decision, is what Congress decided was appropriate in all but the most extraordinary case. In the ordinary course of things, that means a decision by the district court, an appeal, possibly a petition for rehearing en banc, and possibly a petition for certiorari to this Court. That should be the end. Further litigation, at least in federal courts, should be reserved for cases of miscarriage of justice.

Calderon dealt with a power that was not found in the rules or statutes but which a court of appeals was nonetheless thought to possess inherently. See 523 U. S., at 549-550. The present case deals with an exercise of power contrary to the plain wording of Rule 41(d)(2)(D). If such a power is deemed to exist to avoid the absurdity of issuing a mandate and then immediately recalling it, see *supra*, at 14, the power should be limited to that necessity. From the habeas petitioner's viewpoint, the need to reconsider a decision *sua sponte* after certiorari is denied, but before the mandate issues, is no greater than the need to reconsider after the mandate issues. From the state's viewpoint, it has defended its judgment through the same multiple levels of review in either situation. See *Calderon*, *supra*, at 557.

Complete fidelity to the policy choice of Congress would require drawing the line at the same place as § 2244(b). However, *Calderon* drew the line at miscarriage of justice as defined in this Court's pre-AEDPA jurisprudence, and it would be anomalous to have a more restrictive standard here. Given the similarity of the interests involved, it makes sense to draw the line in the same place. Cf. *McCleskey* v. *Zant*, 499 U. S.

467, 493 (1991) (unifying standards for procedural default and successive petition).

To establish a miscarriage of justice, a habeas petitioner must show by the requisite standards either that he is not guilty of the offense or that none of the death-eligibility circumstances is true. See *Calderon*, 523 U. S., at 560. Thompson's evidence does not negate his commission of the crime or any of the three aggravating circumstances. See *Thompson* v. *Bell*, 315 F. 3d 566, 576 (CA6 2003). It would qualify as actual innocence only if the evidence were compelling proof that he was not guilty by reason of insanity, such that " 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." 523 U. S., at 559 (quoting *Schlup* v. *Delo*, 513 U. S. 298, 327 (1995)). The Court of Appeals' action in this case without such a finding was error.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

February, 2005

Respectfully submitted,

KENT S. SCHEIDEGGER

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Criminal Justice Legal Foundation

APPENDIX A

Ninth Circuit Cases Ending in Execution

The following is a list of persons executed in the Ninth Circuit from January 1998 through January 2005, excluding those who voluntarily dropped challenges to their execution, with a description of proceedings in federal court after the United States Supreme Court's denial of certiorari on the initial habeas petition. The descriptions are derived from information in the Ninth Circuit's on-line docket (Pacer), the opinions on its Web site, and the published opinions and orders of the United States Supreme Court.

Jose Ceja, Arizona, executed Jan. 21, 1998:

First habeas case 94-99005, certiorari denied Nov. 10, 1997. Mandate had already issued. No further proceedings of substance on that case. Filed original habeas in Ninth Circuit, 98-80040, denied. Filed new habeas in District Court, contending *Lackey*[1] and method of execution claims not subject to AEDPA. Denial affirmed in case 98-99000. Judge called for en banc vote, failed.

Terry Langford, Montana, executed Feb. 24, 1998:

Habeas case 95-99001, certiorari denied Oct. 6, 1997. Mandate had already issued. Filed 60(b) motion in District Court: denied. CPC denied in case 97-99035, cert. denied.

Jose Villafuerte, Arizona, executed Apr. 22, 1998:

First habeas case 93-99015, certiorari denied Jan. 20, 1998. Mandate had already issued. No further proceedings of

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1. See *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (length of time execution has been delayed by prisoner's own appeals proffered as reason *not* to proceed with execution).

substance on that case. Moved for leave to file successive petition, 98-80303, denied.

Douglas Gretzler, Arizona, executed June 3, 1998:

First habeas case 95-99023, certiorari denied Feb. 9, 1998, rehearing denied Mar. 9, 1998. Mandate had already issued. No further proceedings of substance on that case. Second habeas petition on *Lackey* claim, similar to *Ceja*, denied. Denial affirmed and leave to file successive denied in case 98-80394/99-99019.

Thomas Thompson, California, executed July 14, 1998:

First habeas case 95-99014, certiorari denied June 5, 1997. Mandate issued June 11, 1997. Motion to recall mandate July 22, 1997, denied July 28. Petition to rehear en banc motion to recall mandate July 30, 1997, oral argument Aug. 1. Mandate recalled, habeas relief granted, and mandate issued Aug. 3, 1997. Reversed by Supreme Court April 29, 1998, with instructions to reissue original mandate denying relief.

Filed 60(b) motion in District Court, denied. Appeal docketed as case 97-99018, July 28, 1997. Dismissed as moot Aug. 3, 1997 (same day as decision recalling mandate, above). En banc vote called, failed. Motion to reinstate appeal May 13, 1998 (after Supreme Court decision, above). Court orders briefing and oral argument, June 10, 1998. Argued en banc July 9, 1998. Denial of 60(b) affirmed and leave to file successive denied July 11, 1998. Filed certiorari, mandamus, and original habeas in Supreme Court, all denied July 13, 1998.

Jess Gillies, Arizona, executed Jan. 13, 1999:

First habeas case 96-99010, certiorari denied Oct. 5, 1998, rehearing denied Nov. 30, 1998. Mandate had already issued. No further proceedings of substance on that case. Appealed

from dismissal of civil rights suit, 99-99000. Filed original habeas in Court of Appeals, 99-80004.

Darick Gerlaugh, Arizona, executed Feb. 3, 1999:

First habeas case 95-99018, certiorari denied Oct. 5, 1998. Mandate had already issued. No further proceedings of substance on that case. Appealed from dismissal of civil rights suit in District Court, 99-99000. Filed original habeas in Court of Appeals, 99-80004.

Jaturun Siripongs, California, executed Feb. 24, 1999:

Habeas case 97-99003, certiorari denied Oct. 5, 1998. Mandate issued Oct. 13, 1998.

Filed civil suit in District Court against governor regarding clemency procedures. Governor's mandamus petition denied Nov. 16, 1998. New clemency hearing held.

Motion to recall mandate in 97-99003 and motion for leave to file successive petition, 99-70166, filed Feb. 5, 1999, both denied Feb. 8. En banc vote called and failed same day.

Karl LaGrand, Arizona, executed Feb. 24, 1999:

First habeas case 95-99010, certiorari denied Nov. 2, 1998, rehearing denied Dec. 7, 1998. Mandate had already issued. No further proceedings of substance on that case.

Leave to file successive petition, 99-70180, denied as unnecessary on gas chamber claim (based on *Martinez-Villareal*), and denied as to other claims.

Appeal from District Court's denial of habeas on gas chamber claim, 99-99004, COA granted and reversed on merits, injunction issued, Feb. 24, 1999. Vacated by Supreme Court same day, 525 U. S. 1173.

Walter LaGrand, Arizona, executed Mar. 3, 1999:

First habeas case 95-99011, consolidated with Karl's, same disposition.

Civil suit on clemency procedures, 99-15314, dismissal affirmed Mar. 3, 1999.

Leave to file successive petition and stay denied, 99-70215, Mar. 2, 1999.

Mandamus denied, 99-70221, Mar. 3, 1999.

Stay denied, 99-99005, Mar. 3, 1999.

Use of gas enjoined on successive petition, 99-99006, Mar. 3, 1999, vacated by Supreme Court the same day, 526 U. S. 115.

Manuel Babbitt, California, executed May 4, 1999:

First habeas case 97-99011, certiorari denied Feb. 22, 1999. Mandate issued. Motion for leave to file successive petition, 99-70526, denied May 3, 1999. Judge called for en banc vote, failed. Petition for certiorari (despite 28 U. S. C. § 2244(b)(3)(E)) and original habeas in Supreme Court denied May 4, 1999.

Robert Vickers, Arizona, executed May 5, 1999:

Habeas case 96-99022, certiorari denied Jan. 11, 1999. Mandate had already issued. Motion to recall mandate filed April 30, 1999. Telephonic oral argument held on motion May 1, 1999. Denied same day.

Michael Poland, Arizona, executed June 17, 1999:

First habeas case 95-99022, certiorari denied Apr. 20, 1998. Mandate had already issued. Motion to recall mandate Oct. 15, 1998, denied next day.

Attempted to amend petition in District Court, recharacterized by D.C. to be a new petition raising a *Ford* claim (competency to be executed). Denial affirmed, 99-99016, June 16, 1999.

Another petition, filed in and denied by D.C. June 16, 1999, affirmed and leave to file successive denied, 99-99107, same day.

Two original habeas petitions and two certiorari petitions in Supreme Court denied same day, 527 U. S. 1017.

Ignacio Ortiz, Arizona, executed Oct. 27, 1999:

First habeas case 96-99024, certiorari denied May 17, 1999. Mandate had already issued.

Moved in District Court for relief under Rule 60(b). Denial affirmed, 99-99027, Oct. 25, 1999.

Anthony Chaney, Arizona, executed Feb. 16, 2000:

Habeas case 96-99001. Rehearing and rehearing en banc denied Mar. 11, 1999. Mandate issued Mar. 24, 1999. Motion to direct the Clerk of the Supreme Court to file petition for certiorari out of time denied Oct. 4, 1999, 99M1, 528 U. S. 802. Motion to recall mandate filed Feb. 2, 2000, denied Feb. 8, 2000.

Patrick Poland, Arizona, executed Mar. 15, 2000:

First habeas cases 97-99004 and 97-99005, certiorari denied Oct. 4, 1999. Mandate had already issued.

Leave to file successive petition, 00-70280, denied Mar. 13, 2000. Petition for certiorari (despite 28 U. S. C. § 2244(b)(3)(E)) dismissed for want of jurisdiction and original habeas denied, Mar. 15, 2000, 529 U. S. 1013.

Darrell Rich, California, executed Mar. 15, 2000:

Habeas case 97-99007, certiorari denied Jan. 10, 2000. Mandate issued Jan. 25, 2000.

Civil suit denial of injunction affirmed, 00-99004, Mar. 14, 2000, en banc denied same day, certiorari and stay denied same day, 529 U. S. 1013.

Stephen Anderson, California, executed Jan. 29, 2002:

Habeas case 98-99024. Rehearing and en banc denied May 31, 2001. Mandate stayed for certiorari. Motion for renewed petition for rehearing and continued stay of mandate filed Nov. 9, 2001. (Supreme Court granted certiorari in three other cases on the same conference list on Nov. 8, 2001. See 534 U. S. 1015-1016. On that date, it was predictable with reasonable certainty that certiorari in *Anderson* would be denied on the first business day of the following week, Nov. 13.)

Panel denied motion to reopen Nov. 13, 2001. Supreme Court denied certiorari same day. Anderson moved to rehear motion en banc same day. Court treated as motion to reconsider. Denied with dissenting opinion Dec. 21, 2001. Mandate issued.

Filed mandamus against Clerk of the Ninth Circuit, 01-71771, Nov. 16, 2001. No ruling. Dismissed as moot Feb. 27, 2001.

Filed civil action against Governor and appealed from denial of TRO, 02-70109, Jan. 22, 2002. Injunction pending appeal denied Jan. 24, 2002. Certiorari denied Jan. 28, 2002, 534 U. S. 1119. Rehearing en banc denied Jan. 28, 2002. Certiorari denied again Jan. 29, 2002, 534 U. S. 1120.

Donald Beardslee, California, executed Jan. 19, 2005:

Habeas case 01-99007, rehearing and rehearing en banc denied Jan. 28, 2004. Motion for stay of mandate and for

reconsideration of rehearing filed Feb. 2, 2004. Stay for certiorari granted Feb. 9. Certiorari denied Oct. 4, 2004, 03-10650.

Motion for further stay of mandate for petition for rehearing in Supreme Court filed in Court of Appeals Oct. 4, 2004, granted Oct. 12. Motion for stay of mandate and renewed motion for COA filed Nov. 23. Supreme Court denied rehearing Nov. 29. Mandate stayed for oral argument Dec. 8. Oral argument held Dec. 15. More briefing ordered Dec. 16. Another oral argument Dec. 28. Supplemental opinion affirming denial of habeas Dec. 29.

Petition for rehearing and en banc filed Jan. 5, 2005, denied Jan. 6. App. for stay of execution for certiorari filed Jan. 11, denied Jan. 12. Certiorari denied Jan. 18, 04-8146.

Filed civil action against lethal injection in District Court Dec. 20, 2004. TRO and preliminary injunction denied, Jan. 7, 2005. Appealed to Ninth Circuit, 05-15042. Oral argument Jan. 12. Affirmed Jan. 14. Rehearing and rehearing en banc denied Jan. 15. Certiorari denied Jan. 18, 04-8157.

MAR 2 9 2005

No. 04-514

IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,
v.

GREGORY THOMPSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,200 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner's consent to the filing of this brief is being filed together with this brief. Respondent previously filed its consent to all amicus briefs with the Clerk.

The NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, the NACDL files approximately 35 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because it presents issues concerning the effective assistance of counsel for indigent capital defendants, the fair administration of the death penalty, and courts' inherent powers to *sua sponte* correct important mistakes underlying their judgments to ensure justice. The court of appeals' decision to reconsider its original judgment in this death penalty case, due to errors it discovered itself without meaningful assistance from the parties' counsel, was a responsible and reasonable exercise of the judicial power that should be affirmed.

INTRODUCTION

Respondent has been sentenced to death. Ever since that sentence became final, respondent has maintained that his trial counsel provided constitutionally ineffective assistance by not fully investigating respondent's mental illness and thereby failing to uncover and present substantial mitigating evidence at his capital sentencing proceeding. The court of appeals' decision below orders the district court to conduct an evidentiary hearing on respondent's Sixth Amendment claim. Reviewing the full scope of deposition testimony and expert evidence gathered in this habeas proceeding, including evidence negligently omitted from the district court record, the court of appeals held that the summary judgment dismissal of respondent's habeas corpus petition was improper. The negligently omitted expert evi-

dence supports respondent on the critical factual issue in his case—whether he was mentally ill at the time of the offense.

The Warden (State) seeks respondent's execution without pause for even the evidentiary hearing ordered by the court of appeals, notwithstanding the fact that respondent's mental health at the time of the offense has yet to be examined in any court. The State argues in this Court that procedural rules should have blocked the court of appeals from taking the action that it did. The NACDL agrees with respondent's argument on the question presented, set forth in his merits brief, that the State's procedural argument regarding the issuance of the mandate is erroneous.

The NACDL respectfully submits this brief to defend the eminent reasonableness of the court of appeals' actions in the unique circumstances presented in this capital case. Upon discovering a factual error underlying both the district court's judgment and the court of appeals' previous judgment—namely, the conclusion that no evidence supported respondent's claim that he was mentally ill at the time of the offense—the panel below undertook the humbling exercise of admitting the mistake of its own prior ruling and issuing a new decision. The court of appeals recognized that while it was not required to reconsider its prior determination, this was a proper case for employing its discretion to do so. This careful and responsible exercise of official power should be praised, not condemned. The State disagrees, pressing a sporting theory of justice. The State argues that technical adherence to rules of procedure requires that the State emerge victorious and respondent be executed. But the court of appeals was not required to ignore evidence gathered in this very habeas proceeding that draws the reliability of respondent's death sentence into doubt. No rule of civilized jurisprudence should oblige judges to endorse through silence what they determine to be their own prior error in a case implicating a man's life.

STATEMENT

1. The State of Tennessee charged respondent with the January 1, 1985 murder of Brenda Lane. The state trial court appointed counsel to represent respondent. Both attorneys lacked experience defending capital cases. *See* Pet. App. 280-282; *State* v. *Thompson*, 768 S.W.2d 239, 245 (Tenn. 1989). Trial counsel suspected that respondent was mentally ill, and that he had been so at the time of the offense. Shortly after their appointment, counsel therefore filed a notice of insanity defense and motions seeking psychological, psychiatric, and neurological examinations of respondent to determine (1) whether he was competent at the time of the offense, and (2) whether he was competent to stand trial. In support of the motions, counsel filed an affidavit showing that respondent had suffered two concussions, one in a car accident while a teenager and the second more recently during his service in the Navy, when he was attacked by fellow servicemen. Pet. App. 121. The trial court granted respondent's motions on April 4, 1985, and ordered that respondent be evaluated for 30 days at a state facility. State psychologists conducted the evaluation and determined that respondent was competent. *Id.* at 121-122. To the extent that he showed signs of mental illness, the psychologists concluded that it reflected malingering by respondent. *Id.* at 129-130.

Trial counsel did not trust the state psychologists' finding and therefore requested funds from the trial court to obtain an independent psychiatric evaluation. Pet. App. 122.[2] The court held a hearing on the motion on July 10, 1985. *Id.* at 122 n.3. Meanwhile, three weeks earlier, on June 20, 1985,

[2] One of respondent's trial counsel later testified:

> I do want to say this and this is sincere. You know, we were required to send him for the evaluation, we felt, at the [state facility]. I have literally no faith in any conclusion that comes out of that place, then or now. I didn't have any faith in what came out of it then. I still thought something might be wrong but we didn't have any other place to go that we knew of.

Pet. App. 133-134.

respondent's trial counsel had filed a "Notice of Intent to Use Industrial Psychologist," stating that counsel planned to use testimony by psychologist Dr. George Copple at trial regarding "defendant's mental condition and abilities." *Id.* at 123 n.4, 231. An "industrial psychologist" specializes in human behavior in the workplace. *Id.* at 183. On July 29, 1985, the trial court granted respondent's request for funds and ordered the Tennessee courts to pay for counsel to obtain an independent psychiatric evaluation of respondent. *Id.* at 122-123.

Nevertheless, despite trial counsel's expressed doubts about the impartiality of the state psychologists' determination of respondent's competence, their suspicions about respondent's mental illness and knowledge of his head injuries, and their previously stated "need" for an independent psychiatric evaluation, trial counsel never used the court-ordered funds to obtain such an evaluation. Pet. App. 122-123 & n.3; *Thompson* v. *State*, 958 S.W.2d 156, 164 (Tenn. Crim. App. 1997). Counsel later offered the meager excuse "that they could not find a psychiatrist in Nashville since the psychiatrist they ordinarily used had moved out of state." Pet. App. 181. Counsel ultimately used the court-ordered funds merely to pay Dr. Copple, a psychologist whose recent expertise was evaluating social security applicants' vocational abilities and who trial counsel already had decided to use in his distinct capacity as an industrial psychologist at the time they sought the funds for a psychiatrist. *Id.* at 123 & n.4, 181-183, 188. Counsel apparently conducted no further investigation into respondent's mental illness.

Respondent offered no proof during the guilt phase of his trial, and the jury convicted him of first-degree murder. Pet. App. 123; 768 S.W.2d at 244. At the separate sentencing phase, trial counsel pursued a strategy "to emphasize positive attributes of [respondent] and show the jury that he could lead a productive life in prison." 958 S.W.2d at 167; *see also* Pet. App. 262-263. To that end, trial counsel called former acquaintances and family members who portrayed respondent as a "non-violent, cooperative, responsible young

person through his school years, until he joined the Navy." 768 S.W.2d at 244. Counsel also called Arlene Cajulao, respondent's girlfriend during his military service in Hawaii, who described respondent as "caring and sensitive." Pet. App. 124. Cajulao also testified that after respondent suffered a head injury "when three of his fellow service members attacked him with a crow bar," he began to act paranoid and to express unreasonable concern for Cajulao's and his own safety. *Id.*; *see also id.* at 193; 768 S.W.2d at 244.[3] Finally, Dr. Copple testified about respondent's "personality and capabilities for employment in prison." 768 S.W.2d at 244. On cross-examination, Dr. Copple admitted that, in his opinion, respondent did not suffer from any mental illness. Pet. App. 11.

The jury imposed the death penalty, and the trial court sentenced respondent to death. Pet. App. 130. Respondent's conviction and sentence were affirmed on direct appeal, *see* 768 S.W.2d 239, and this Court denied certiorari. *Thompson* v. *Tennessee*, 497 U.S. 1031 (1990).

2. In October 1990, represented by new counsel, respondent sought post-conviction relief in state court. Pet. App. 130-131 & n.9. Respondent argued, *inter alia*, that his trial counsel rendered constitutionally ineffective assistance by "fail[ing] to investigate adequately [respondent's] background and personal and medical history for the existence of mitigating evidence." *Id.* at 13; *see* 958 S.W.2d at 162.

Respondent filed a motion seeking funds to hire both a psychologist (or psychiatrist) and an investigator to assist in

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[3] Specifically, Cajulao testified:

> He would get very paranoid. When we lived together, we had a fern tree growing on the side of the house; and he was constantly chopping the back side of it down. He would tell me when I came home to make sure nobody was standing behind there that might hurt me. If we heard noises in the evening, I would get up and find him walking around the house, thinking somebody might be there. He got very paranoid after that.

Pet. App. 263.

the preparation of his case. In support of the request, respondent filed an affidavit by Dr. Gillian Blair, a clinical psychologist. Pet. App. 131; *see* Opp. App. 35-39 (Blair affidavit). Dr. Blair explained that she had reviewed respondent's medical records since his conviction in 1985, which occurred approximately eight months after respondent's commission of the crime. The prison medical records documented respondent's "escalating psychiatric problems." *Id.* at 36. Respondent had attempted suicide and exhibited symptoms of "thought blocking, suspiciousness, inappropriate affect, hallucinations and agitation." *Id.* at 37. His mental status "rapidly deteriorated to include flight of ideas, marked tangentiality, grandiose delusions, thought projection, obsessive ideas and paranoia." *Id.* Three psychiatrists employed at the maximum security institution where respondent was incarcerated variously diagnosed him as having bipolar affective disorder, schizoaffective disorder, or schizophrenia, paranoid type. Respondent was taking Lithium to treat the bipolar disorder, Haldol to treat psychotic symptoms, and Cogentin to minimize the side-effects of the anti-psychotic medication. *Id.* In contrast to the psychologists who evaluated respondent prior to trial, a treating psychiatrist at the prison rejected the possibility of malingering because it failed to explain respondent's psychotic symptoms. *Id.*

Dr. Blair stated that a full psychological evaluation—including a complete social and medical history—would be necessary for her to render an opinion about respondent's condition, especially his mental condition at the time of the offense. She also set forth the approximate amount of money that would be needed to complete such an evaluation. Opp. App. 38-39. Importantly, Dr. Blair opined that if respondent were suffering from a neurological or psychological impairment, as his records appeared to indicate, "it is likely that some degree of such impairment would have existed at the time of the offense." *Id.* at 38; Pet. App. 132.

The state trial court denied respondent's request for funds. 958 S.W.2d at 170. In March 1995, the court held an evidentiary hearing at which both of respondent's trial coun-

sel testified. Pet. App. 132. Attorney Parsons admitted that counsel had been "aware of the possible 'significance' of [respondent's head] injuries but did not get all of the medical records." 958 S.W.2d at 164. Attorney Richardson acknowledged that they were not "as thorough as [they] should have been," and that "probably with some more digging," they could have identified respondent's mental illness. *Id.* Counsel testified that, having failed to hire a psychiatrist, they settled on their strategy of accentuating respondent's good qualities and avoiding any portrayal of respondent as mentally ill or a potentially harmful individual. *Id.* Dr. Blair also testified at the evidentiary hearing consistent with her prior affidavit. Pet. App. 135-137.

The trial court denied post-conviction relief, finding that respondent had "presented no proof of mental problems ... that would have been a defense to the charge, or that would constitute a shield against execution." Pet. App. 138. The Tennessee Court of Criminal Appeals affirmed. *See* 958 S.W.2d 156. The court recognized that counsel has "a greater duty of inquiry into a client's mental health ... for the penalty phase of a capital trial," and that "[e]ven when court-ordered examinations result in a finding of sanity, defense counsel should always attempt to determine whether psychological infirmities may be used as mitigating evidence." *Id.* at 164-165 (alterations, internal quotation marks, and citations omitted). Nonetheless, the court held that because respondent presented no evidence that he was mentally ill at the time of the offense, he failed to demonstrate prejudice from trial counsel's ineffective assistance. *Id.* at 165. For related reasons, the court found that trial counsel had made a reasonable tactical decision: "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.* The Tennessee Supreme Court denied discretionary review on October 20, 1997. Pet. App. 142.

3. a. On January 23, 1998, respondent sought habeas corpus relief in federal district court. The court granted respondent's motion seeking appointment of counsel to investigate, prepare, and file a petition on his behalf and appointed counsel from the Federal Defender Services of Eastern Tennessee, Inc. Pet. App. 16-17. Habeas counsel filed a petition for a writ of habeas corpus on June 12, 1998, in which respondent again alleged that his trial counsel had rendered constitutionally ineffective assistance. The petition claimed, *inter alia*, that counsel failed to perform a reasonable investigation of his background and mental health history, to secure adequate expert assistance regarding his mental health, to discover available evidence of his mental illness, and to investigate and challenge his competency at the time of the offense. *Id.* at 17-18. The district court granted respondent's request for discovery, finding that "if the facts are developed to show that [respondent's] mental health should have been introduced as mitigating evidence, [respondent] may be entitled to relief." *Id.* at 145; *see* 28 U.S.C. § 2254 Rule 6 ("Habeas Rule 6").

Respondent's habeas counsel obtained the necessary expert evidence on the critical issue in the case—whether respondent was mentally ill at the time of the offense. Respondent consulted two experts in the federal habeas proceeding. The first, Dr. Barry Crown, did not reach any conclusions regarding respondent's mental state at the time of the crime. Dr. Crown, a neuropsychologist, met with respondent in June 1998 and reviewed fourteen years' of mental health professionals' reports on respondent. Pet. App. 145-146. During a deposition conducted by the State on July 20, 1999, Dr. Crown testified that in his opinion respondent suffered from some form of organic brain damage, but that it was secondary to a schizoaffective disorder, bipolar type. *Id.* at 40, 45, 146. Dr. Crown acknowledged that he had not been asked to render an opinion on whether respondent was mentally ill at the time of the offense. *Id.* at 146. Dr. Crown did testify, however, that schizoaffective disorder tends to develop in late adolescence to early adulthood. *Id.* at 46. Respondent was 23 years old at the time of the crime. *Id.* at 11.

Respondent's second expert, Dr. Faye Sultan, a clinical psychologist, did offer an opinion on the critical issue in re-

spondent's case, concluding that he was mentally ill at the time of the offense. Dr. Sultan prepared a psychological report, dated July 22, 1999, and was deposed by the State on the same date. JA 11-20 (report), 21-87 (deposition).[4] In her report, Dr. Sultan explained that she had met with respondent three times, beginning in August 1998. She also reviewed respondent's extensive legal, military, medical, prison, and psychiatric/psychological records. The prison medical records documented that respondent "suffered from significant mental illness since at least the time of [his] incarceration in 1985." JA 14.

Dr. Sultan also based her opinions on interviews of respondent's grandmother and sister, and a discussion with an investigator who, in turn, interviewed respondent's former girlfriend, Cajulao. Respondent's grandmother, Maybelle Lamar, recalled that respondent "display[ed] significantly 'different' behavior" when he returned from his military service in Hawaii. Lamar observed that respondent was "angry," "sometimes sad," "star[ed] off into space," and "talk[ed] to himself." JA 16. Respondent's sister, Nora Jean Hall Wharton, described respondent's difficult childhood, which included abuse and neglect. For example, on one occasion during early childhood, respondent and his siblings were left for days to fend for themselves without money or food and, on another occasion, respondent and Wharton witnessed their biological father brutally beat and rape their mother, during which respondent screamed and sobbed uncontrollably. JA 17. Wharton also described respondent's childhood habit of "repeatedly banging his head against the wall," which respondent explained at the time as attempting to "knock the Devil out" of his head. JA 17-18. Like Lamar,

[4] Dr. Sultan had also submitted an earlier affidavit in support of an *ex parte* motion to enjoin the habeas proceedings due to respondent's incompetence. The necessity for that motion arose when respondent stopped receiving his medication. Dr. Sultan's affidavit in support of the *ex parte* motion did not address respondent's mental state at the time of the offense. Pet. App. 144 n.13.

Wharton also described respondent as behaving "significantly different" upon returning from his military service in Hawaii. JA 18. She noted that respondent "would become extremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat." *Id.* At one point, Lamar and Wharton discussed bringing respondent to the psychiatric unit of the local hospital for treatment. *Id.* Finally, through the investigator, Dr. Sultan learned that respondent had several incidents of unexplained paranoid and aggressive behavior while living with Cajulao in Hawaii, including closing all the curtains in their house to avoid unidentified people who he said were "after" him or "looking" for him. JA 19.

Based on her investigation, Dr. Sultan concluded that respondent "experienced symptoms of major mental illness throughout his adult life," and that the available information suggested that respondent had "display[ed] significant signs of mental illness from the time he was a small child." JA 19. Dr. Sultan opined that respondent was most appropriately diagnosed as having schizoaffective disorder, bipolar type. "As is typical of this illness, symptoms became apparent in early adulthood." JA 20. In conclusion, Dr. Sultan found that respondent "was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced." *Id.* The report also noted that the information concerning respondent's early mental illness and social history was available at the time of his 1985 trial. *Id.*

The State deposed Dr. Sultan on July 22, 1999. JA 21-87. During the deposition, Dr. Sultan described her three interactions with respondent, as well as the various records and interviews on which she based her report. Dr. Sultan also recounted the tales she heard from respondent's sister about his childhood, including his self-injurious behavior of beating his head against the wall and his numerous and severe emotional outbursts as a child. JA 72-76. Dr. Sultan explained that together, these incidents were "early indicator[s] of a problem," and that in hindsight, they can properly

be seen as a precursor to respondent's later mental illness. JA 74. Dr. Sultan also described the reports of respondent's paranoid behavior during his military service and his increasingly strange behavior upon returning from Hawaii. JA 68, 78-79.

Dr. Sultan repeated and explained her diagnosis of schizoaffective disorder, bipolar type:

> [T]here is a long history, perhaps at this point almost a 20-year history, of simultaneous thought disorder on the part of [respondent] documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur—lots of different kinds of delusions actually—auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.
>
> . . . .
>
> The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

JA 76-77. Finally, Dr. Sultan stated that respondent's mental illness would have substantially impaired his ability to conform his behavior to the requirements of the law, given his delusions, hallucinations, and his lack of control over his emotions. JA 79-80.

On February 17, 2000, the district court granted the State's motion for summary judgment and denied an evidentiary hearing. Pet. App. 202-332. The court based its decision primarily on the absence of evidence that respondent was mentally ill at the time of the offense. *Id.* at 270. In this respect, the Court noted in particular that Dr. Crown offered no opinion on respondent's mental health at the time of

the crime. *Id.* at 269. The court did not discuss Dr. Sultan's psychological report or deposition testimony because respondent's habeas counsel negligently failed to submit that evidence to the court as part of respondent's opposition to the State's motion for summary judgment. *Id.* at 56-57. More than a year after the district court's decision dismissing respondent's petition, habeas counsel recognized the omission and filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure in March 2001, attaching Dr. Sultan's report and deposition testimony. *Id.* at 55. The district court denied the motion as untimely and found habeas counsel's failure to file the evidence at an earlier date to be unreasonable and inexcusable. *Id.* at 78-79.[5]

b. In January 2003, a divided panel of the court of appeals affirmed. Pet. App. 117-201. The court of appeals, like the district court, relied principally on the absence of evidence that respondent was mentally ill at the time of the offense. Judge Suhrheinrich's lead opinion explained:

> Counsel has now had numerous opportunities via expert testimony to establish that [respondent] suffered from organic brain disease or mental illness at the time of the crime. And yet, at each opportunity, counsel fails to secure an answer to the critical issue of whether [respondent] was mentally ill at the time of the crime.

Id. at 160; *see also id.* at 118 ("Because we find that [respondent] has presented no evidence that he was mentally ill at the time of the crime or at trial, we AFFIRM the judgment of the district court."). This evidentiary shortcoming was relevant to both prongs of the ineffective-assistance inquiry under *Strickland* v. *Washington*, 466 U.S. 668 (1984). First,

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[5] The Rule 60(b) motion explained the omission of Dr. Sultan's report and deposition testimony as having been caused by habeas counsel's extremely heavy capital habeas corpus caseload at the time of the summary judgment briefing. Habeas counsel stated that he had incorrectly assumed that the State had submitted Dr. Sultan's report and deposition testimony. Pet. App. 76-77.

"absent some evidence of organic brain damage or mental illness at the time of the crime, trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." Pet. App. 160. Second, there could be no prejudice from any alleged ineffective assistance "because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime." *Id.* at 164 (emphasis in original). Finally, the absence of evidence on the critical issue also provided the basis for denying respondent an evidentiary hearing. Judge Suhrheinrich explained that the "fail[ure] to present any evidence demonstrating a genuine issue of material fact as to [respondent's] claim of incompetence at the time of the offense," notwithstanding the fact that the district court had afforded respondent discovery under Habeas Rule 6, demonstrated that there was no need for an evidentiary hearing. *Id.* at 170.

Judge Moore concurred in the result "solely on the basis of the facts in this case," where respondent had presented no "evidence that a more appropriate psychological or psychiatrist expert would have testified to [respondent's] mental illness or his deteriorating mental condition." Pet. App. 171. Judge Clay dissented, finding the state court had unreasonably applied *Strickland* in rejecting respondent's ineffective-assistance claim. *Id.* at 172-201. This Court denied certiorari on December 1, 2003, and denied a petition for rehearing on January 20, 2004. JA 91-92.

c. In June 2004, the court of appeals issued a new decision, vacating the district court's judgment and remanding for an evidentiary hearing on respondent's Sixth Amendment claim. Pet. App. 1-116. As Judge Suhrheinrich's opinion concurring in part and dissenting in part from the judgment explains, a statement by an intern in his chambers spurred Judge Suhrheinrich to thoroughly review the full certified record in the case. *Id.* at 8. As the court of appeals' docket reflected, the court recalled the certified record from the district court and received it in September 2003. *See* JA 7-8. In his review, Judge Suhrheinrich unearthed Dr. Sultan's report and deposition. Judge Moore, writing for herself and Judge Clay, recognized the "extremely probative" nature of the evidence and endorsed Judge Suhrheinrich's summary in his separate opinion of its importance to the critical issue in respondent's case. Pet. App. 2.

As Judge Suhrheinrich explained, the court of appeals' prior judgment had been based on a conclusion that no longer could be described as true: that there was no evidence that respondent was mentally ill at the time of the offense. *See* Pet. App. 7 ("Essential to our conclusion that [respondent] was not denied effective assistance of counsel ... was our finding that [respondent] has never submitted to any court any proof that he suffered from severe mental illness at the time of the crime.") (internal quotation marks and emphasis omitted). In particular, the court of appeals previously had found that trial counsel's performance was not deficient under *Strickland* "principally" because of this evidentiary shortcoming. *Id.* at 84. Dr. Sultan's report and testimony, however, spoke directly to the issue of respondent's mental illness in 1985. Based on that evidence, and the fact that "trial counsel here had more than sufficient leads to investigate further," Judge Suhrheinrich found that Dr. Sultan's testimony supported a finding of trial counsel's deficient performance. *Id.* at 87. The court of appeals' earlier opinion also had found that there could be no prejudice from trial counsel's alleged ineffective assistance absent some evidence that respondent actually was mentally ill at the time of the offense. Dr. Sultan's report and deposition provided that evidence, thereby also supporting a finding of prejudice. *Id.* at 88-89.

Given the indisputable importance of Dr. Sultan's report and deposition to the critical issue in respondent's habeas challenge, the court of appeals exercised its equitable power to supplement the record on appeal:

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of [respondent's] mental state at the time of the crime, because there is no surprise to [the State] as

> it was [the State's] counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record.

Pet. App. 5-6. Based on the expanded appellate record, the court of appeals remanded the case to the district court for an evidentiary hearing; it did not grant the habeas writ. The court observed that its reconsideration of its prior decision was proper because the mandate had not yet issued. *Id.* at 6. Judge Suhrheinrich added that he felt that it was "incumbent upon [him], as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling." *Id.* at 8. In remanding, the court of appeals stayed respondent's execution for 180 days to permit the district court to proceed with the evidentiary hearing. *Id.* at 6.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that respondent was entitled to an evidentiary hearing on the merits of his habeas petition. Once the court discovered Dr. Sultan's report and deposition, it wisely determined that the district court's summary judgment dismissal of respondent's petition could not stand. Dr. Sultan's evidence critically undermined the state and federal courts' prior conclusions concerning both factors of *Strickland* v. *Washington*, 466 U.S. 668 (1984). Dr. Sultan's report and deposition revealed the substantial mitigating evidence that trial counsel would have discovered had they simply used the funds obtained from the trial court to acquire an independent evaluation of respondent, rather than using those funds to pay their previously engaged industrial psychologist. Dr. Sultan's evidence also refutes the only basis on which the state and federal courts in respondent's case had found that trial counsel's failures did not prejudice respondent. Stated succinctly, Dr. Sultan's

conclusions confirm that there is evidence that respondent was mentally ill at the time of the offense.

II. Having determined that its prior judgment was erroneous, the court of appeals responsibly and reasonably reconsidered that judgment. Dr. Sultan's report and deposition concerned an important point in respondent's habeas challenge to his death sentence. Indeed, because the evidence supported a claim that trial counsel was deficient for failing to present important mitigation evidence to respondent's capital sentencing jury, the court of appeals had a substantial reason to doubt the reliability of respondent's death sentence. In these circumstances, and given this Court's Sixth and Eighth Amendment jurisprudence, the court of appeals' exercise of its discretion to reverse its own prior judgment was more than reasonable. *See, e.g. Strickland*, 466 U.S. at 685; *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989).

The method by which the court of appeals corrected its judgment was also reasonable. The court never indicated to the State that appellate proceedings were final and, in fact, the docket indicated precisely the opposite. In any event, the State's complaints that they were entitled to reasonably rely on the finality of the court of appeals' first judgment should be viewed with skepticism. The State's briefs in the court of appeals may have helped contribute to, and certainly did nothing to prevent, the court's original error.

ARGUMENT

I. THE COURT OF APPEALS' DECISION TO REMAND RESPONDENT'S CASE FOR AN EVIDENTIARY HEARING WAS CORRECT

Respondent convincingly argues in his merits brief that the court of appeals correctly exercised its inherent power to withhold the mandate and reconsider its prior decision. The NACDL agrees with respondent's argument on the procedural question before the Court.

As demonstrated here, when the court of appeals reconsidered the case, it also correctly determined the underlying

merits of respondent's appeal—namely, that respondent was entitled to an evidentiary hearing on his Sixth Amendment claim. Once Dr. Sultan's report and deposition came to light and were equitably added to the appellate record, the district court's summary judgment dismissal of respondent's habeas petition could no longer be justified. Together with evidence developed in state court, Dr. Sultan's evidence demonstrates the error of the state court's resolution under *Strickland* v. *Washington*, 466 U.S. 668 (1984), of respondent's allegations that (1) his trial counsel was ineffective in not fully investigating respondent's mental health, and (2) had trial counsel been effective, there is a reasonable probability that the outcome of respondent's capital sentencing proceeding would have been different. *See* 28 U.S.C. § 2254(d)(1).[6]

Respecting *Strickland*'s first prong, the Tennessee Court of Criminal Appeals determined that respondent's trial counsel was reasonably effective based principally on the absence of evidence that respondent was mentally ill at the time of the offense. *See* 958 S.W.2d at 165 ("counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion"). The existence of Dr. Sultan's report and deposition directly refutes the premise underlying that decision. As the court of appeals recognized, Dr. Sultan concluded that respondent was mentally ill at the time of the offense. Pet. App. 84.

Moreover, any finding that trial counsel made a reasonable tactical decision to present respondent's good qualities to the sentencing jury, and to intentionally avoid pursuing an allegedly unsupported mental-illness mitigation defense, is undercut by both Dr. Sultan's report and deposition (which demonstrate that a mental-illness mitigation defense was supported by expert psychological evidence) and the facts developed in state court. This Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510, 522 (2003), which applied *Strickland* on habeas review under 28 U.S.C. § 2254(d)(1), clarifies the issue. This Court reaffirmed there:

> "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690-691). As in *Wiggins*, respondent's trial counsel here abandoned their investigation into respondent's mental health "at an unreasonable juncture," *id.* at 527, failing to employ the court-ordered funds to obtain the independent psychiatric evaluation of respondent that counsel previously had deemed necessary.

By abandoning their efforts to obtain such an evaluation, or to otherwise search for evidence regarding respondent's past mental health, trial counsel failed to fulfill their professional obligation to conduct a thorough investigation of respondent's background and mental health. *See Wiggins*, 539 U.S. at 522 (citing *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000)). According to the Tennessee Court of Criminal Appeals, counsel had a duty under Tennessee case law to continue their efforts, notwithstanding the state psychologists' determination that respondent was sane: "Even when court-ordered examinations result in a finding of sanity, defense counsel should always attempt to determine whether psychological infirmities may be used as mitigating evidence." 958 S.W.2d at 165; *cf. Wiggins*, 539 U.S. at 524 (finding that counsel's conduct fell below prevailing Maryland standards). Trial counsel made no such attempt here.

Trial counsel's own actions demonstrate that, based on what they knew at the time that the state psychologists rendered their determination on respondent's mental health, counsel themselves believed that further investigation into respondent's mental health was necessary. *See Wiggins*, 539

[6] This Court's decision in *Williams* v. *Taylor*, 529 U.S. 420, 434-435 (2000), confirms that evidence developed in a federal evidentiary hearing is relevant to the § 2254(d) inquiry.

U.S. at 525 (finding scope of counsel's investigation unreasonable "in light of what counsel actually discovered"). As Judge Suhrheinrich recounted, trial counsel knew that respondent exhibited signs of mental illness, that he was experiencing extreme mood changes, and that he had described hearing auditory hallucinations throughout his life. Pet. App. 87-88. Based on that knowledge, rather than accept the state psychologists' findings, respondent's counsel sought funds from the trial court to pay for an independent psychiatric evaluation of respondent. Counsel explained to the court that they "need[ed]" that evaluation to defend respondent. *Id.* at 122 n.3. The trial court agreed and granted counsel's request, thereby objectively confirming the reasonable necessity for trial counsel to continue their investigative efforts.

Yet, once counsel were granted the requested funds, they unreasonably failed to use them to obtain the needed independent psychiatric evaluation. Trial counsel feebly explained their failure at the post-conviction hearing only by saying that a Nashville psychiatrist they had used in the past had moved out of state. Pet. App. 181. Under *Strickland*, counsel's abandonment of their investigation into respondent's mental health at that juncture, and on such insubstantial grounds, was unreasonable. *See Wiggins*, 539 U.S. at 524 (finding counsel ineffective where, "[d]espite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report").

Trial counsel's conduct cannot alternatively be defended based on the unwarranted assumption that counsel hired Dr. Copple to provide the necessary independent evaluation of respondent. Counsel's own actions undercut any such finding. Respondent's counsel put Dr. Copple to work, and notified the trial court of their intent to use him in his distinct capacity as an industrial psychologist, *before* trial counsel even knew whether they would receive the funds they sought for the psychiatric evaluation—indeed, before counsel even orally argued their request to the trial court on July

10, 1985. *See* Pet. App. 123 n.4 (notice of intent), 126 (noting that Dr. Copple first met with respondent on May 15, 1985, "looking . . . at what things he might be capable of doing in a prison situation").

Finally, the reasonableness of trial counsel's highly questionable sentencing strategy is undercut by the case they actually presented to the sentencing jury. Counsel did not limit their defense to a portrayal of respondent's good qualities and his ability to thrive vocationally in prison, to the exclusion of evidence that might portray respondent as potentially mentally ill and dangerous. Rather, trial counsel affirmatively elicited testimony from respondent's former girlfriend, Cajulao, about the head injury respondent suffered during his military service and his subsequent increasingly bizarre, paranoid behavior. Pet. App. 124, 193. Trial counsel's development of this testimony is flatly inconsistent with any alleged tactical decision to avoid the portrayal of respondent before the sentencing jury as suffering from brain damage or as presenting a potential danger if released from prison. *See Wiggins*, 539 U.S. at 526 (finding record of sentencing proceedings to undercut counsel's alleged strategic judgment).

Dr. Sultan's report and deposition demonstrate that had trial counsel exercised their professional duty to fully investigate respondent's mental illness—and actually used the funds they obtained from the trial court to obtain an independent psychiatric evaluation, rather than to help pay their industrial psychologist—there was a wealth of mitigating evidence, all available in 1985, that they would have discovered. Had that evidence been presented to respondent's sentencing jury, there is "a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. All of the decisions in this case that rejected respondent's Sixth Amendment claim—both in state court and federal court—resolved the *Strickland* prejudice factor against respondent solely on the ground that no evidence existed that he was mentally ill at the time of the offense. *See* 958 S.W.2d at 165 (state appellate court);

Pet. App. 270 (federal district court); *id.* at 163-164, 170 (federal court of appeals' first decision). Dr. Sultan's report and deposition refute the premise of those decisions and provide powerful and compelling mitigation evidence of respondent's mental illness and social history. As this Court has recognized, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to ... mental problems, may be less culpable than defendants who have no such excuse." *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted); *see also Wiggins*, 539 U.S. at 535 (same, in context of addressing *Strickland* prejudice prong).

In sum, the court of appeals correctly held that Dr. Sultan's report and deposition, together with the facts developed in state court, provide support for respondent's argument that denial of his Sixth Amendment claim was contrary to or an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). The dismissal of respondent's petition on summary judgment was thus improper. It bears repeating that the court of appeals did not order the district court to grant respondent's habeas petition. Having reversed the summary judgment order, the court of appeals determined only that respondent's allegations and evidence justified an evidentiary hearing on his Sixth Amendment claim in the district court. *See* 28 U.S.C. § 2254 Rule 8. That holding is correct. *See, e.g., Townsend* v. *Sain*, 372 U.S. 293, 312-313 (1963).

The Antiterrorism and Effective Death Penalty Act (AEDPA) is no bar to an evidentiary hearing here. *See* Pet. 28-30. AEDPA precludes a hearing where a habeas applicant "has *failed to develop* the factual basis of a claim in State court proceedings," unless the applicant can satisfy certain requirements. 28 U.S.C. § 2254(e)(2) (emphasis added). Respondent did not, however, fail to develop the factual basis for his Sixth Amendment claim in state court. In *Williams* v. *Taylor*, 529 U.S. 420, 431-432 (2000), the Court clarified that the statutory phrase "failed to develop"

implies an absence of diligence on the habeas applicant's part. Respondent diligently sought funds from the state post-conviction court to develop the facts regarding his mental health at the time of the offense. Notwithstanding Dr. Blair's compelling affidavit, the state court denied that funding request, thereby blocking respondent's ability to conduct the necessary investigation and development of the facts. *See* pp. 6-7, *supra*. This Court confirmed in *Williams* that a habeas applicant who seeks funds in state court to investigate a claim, like respondent did here, is diligent for purposes of § 2254(e)(2). *See* 529 U.S. at 442-443 (respondent's request for funds in state court to investigate the facts underlying his constitutional claim was sufficient to avoid the § 2254(e)(2) bar).[7]

II. THE COURT OF APPEALS ACTED RESPONSIBLY AND REASONABLY IN RECONSIDERING ITS PRIOR DECISION BASED ON DR. SULTAN'S EVIDENCE

Having determined that the findings contained in Dr. Sultan's report and deposition critically undermined its original decision, the court of appeals reconsidered its prior judgment. The court recognized that the discovery of Dr. Sultan's evidence did not *require* the court to expand the appellate record and to reverse its earlier decision, but the court determined that this was a proper case in which to exercise its *discretion* to undertake such action. *See* Pet. App. 4-6 (majority), 114-115 (Suhrheinrich, J.). In the special cir-

[7] No "fail[ure] to develop" can properly be found based on the treatment of respondent's appeal in his state post-conviction proceedings. The parties briefed this issue below and the court of appeals implicitly resolved it in respondent's favor by ordering an evidentiary hearing. The State raised its § 2254(e)(2) argument again in its certiorari petition, but this Court denied review of the question. In any event, respondent did diligently appeal the trial court's denial of his motion for funds, but the state appellate court affirmed on a technical ground, retroactively imposing the procedural requirements of a later Tennessee Supreme Court decision. *See* 958 S.W.2d at 171 (applying "proof" requirements of *Owens* v. *State*, 908 S.W.2d 923 (Tenn. 1995), which was decided subsequent to respondent's motion for funds).

cumstances presented here, the court's discretionary decision to correct its prior determination was a reasonable and responsible exercise of the judicial power.

The negligently omitted evidence from Dr. Sultan did not concern merely a minor detail in a run-of-the-mill case. Rather, Dr. Sultan's report and deposition refuted the principal basis for both the district court's summary judgment order and the original court of appeals decision on respondent's Sixth Amendment claim. That ineffective-assistance claim, in turn, concerned trial counsel's failure to present important mitigating evidence about respondent's character to the capital sentencing jury. Trial counsel's deficient performance cast the reliability of respondent's death sentence into unacceptable doubt. This Court observed in *Strickland* that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results," 466 U.S. at 685, and that "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id.* at 694.

Additionally, when an ineffective-assistance claim concerns a failure by an attorney to present important mitigation evidence to a capital sentencing jury, there is further reason to question the reliability and justice of the resulting sentence. The Eighth Amendment imposes a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case," *Caldwell* v. *Mississippi*, 472 U.S. 320, 340 (1985) (internal quotation marks and citation omitted), so this Court has held that a jury's consideration of all relevant mitigating evidence "is a constitutionally indispensable part of the process of inflicting the penalty of death." *California* v. *Brown*, 479 U.S. 538, 541 (1987) (internal quotation marks and citation omitted). This is especially true of evidence that a capital defendant suffered from mental illness at the time he committed the crime. As noted,

"evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to ... mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 492 U.S. at 319 (internal quotation marks and citation omitted).

These principles strongly support the court of appeals' exercise of its discretion to reconsider its prior decision here. The court surely was not required to ignore evidence developed in this proceeding that so substantially undermines the reliability of respondent's death sentence. "[T]he penalty of death is qualitatively different from a sentence of imprisonment .... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Lankford* v. *Idaho*, 500 U.S. 110, 125 n.21 (1991) (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality)). Given the differential treatment of the death penalty under the Eighth Amendment compared to other forms of criminal sentences, the court of appeals' decision to exercise its discretion in this case because it implicated a man's life is entirely proper. *See* Pet. App. 5 (majority), 116 (Suhrheinrich, J.).

The manner in which the court of appeals exercised its discretion to reconsider its prior judgment also was reasonable. The panel recognized that the judgment was undermined by Dr. Sultan's report and deposition, forthrightly admitted the resulting error in its own decision, and acted to correct it. This was not a case, like *Calderon* v. *Thompson*, 523 U.S. 538 (1998), where one three-judge panel is tardily reversed after the conclusion of all appellate proceedings by other members of the court. Indeed, there is no indication here that any judge of the court of appeals disagreed with the panel's determination to reconsider its prior judgment. Judges should not be condemned for recognizing and correcting mistakes in their own judgments. *Cf. Henslee* v. *Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never

comes, and so one ought not to reject it merely because it comes late.").

The court of appeals' actions also reflect care to avoid any unfair, adverse impact on the State's professed interest in relying on a final court judgment. At all times, it should have been clear that there was no final judgment on which to rely. For example, when the court determined to revisit the record, it apparently made that known on its public docket, which indicated to all who were reviewing it that approximately five months after the record had been returned to the district court it was recalled and refiled in the court of appeals. *See* JA 7-8. Similarly, after this Court denied respondent's petitions for certiorari and for rehearing, the court of appeals' docket (JA 8) revealed that no mandate had issued. *Compare Calderon*, 523 U.S. at 556 (noting that "when a federal court of appeals issues a mandate denying federal habeas relief ... the State is entitled to the assurance of finality"). Finally, the only available evidence indicates that, once the court of appeals discovered the error underlying its prior opinion, it worked diligently to correct that error in a new decision. *See* Pet. App. 8 (description of Judge Suhrheinrich's efforts). There is no evidence that the court acted in a dilatory fashion to await further state court action. *Compare Calderon*, 523 U.S. at 548 (court of appeals "considered whether to recall the mandate sooner, but had chosen to wait until the conclusion of [the respondent's] state-court proceedings").

Finally, the State should hardly be heard to complain about the Sixth Circuit's determination to thoroughly review the record and correct its earlier decision. Respondent's counsel properly bears the blame for failing to file Dr. Sultan's report and deposition in the district court. Nevertheless, the State's brief in the court of appeals hardly provided the assistance courts expect from attorneys (and especially government attorneys), who are after all officers of the court. The State argued in that brief:

> With regard to his claim of ineffective assistance of counsel, *despite the benefit of discovery in federal habeas proceedings and federal funding for mental health experts*, [respondent] presented no proof of his mental state at the time of the offense or at trial to support his contention that trial counsel was ineffective in failing to present proof regarding his mental state.

Final Brief of Respondent-Appellee at 40 (emphasis added). The State's careful use of the term "presented" makes the statement literally true, as respondent's habeas counsel failed to present Dr. Sultan's report or deposition in opposition to the State's summary judgment motion. But the implication of the State's argument—that respondent *could not* present such evidence "despite the benefit of discovery in federal habeas proceedings and federal funding for mental health experts"—is surely misleading. Having taken Dr. Sultan's deposition and viewed her report, the State knew that the "federal funding for mental health experts" did result in evidence of respondent's mental illness at the time of the offense. *See id.* at 43 & n. 12 (making same argument with same implication). Had the State wanted a secure final judgment, it could have advised either the district court or the court of appeals of Dr. Sultan's evidence and responded to it appropriately.

The State's argument in its brief appears to have had its intended effect on the court of appeals. Judge Suhrheinrich's original opinion in this case echoed the State's argument:

> [Respondent] ... failed to present any evidence demonstrating a genuine issue of material fact as to his claim of incompetence at the time of the offense and at trial. This is true even though the district court granted him further discovery under Habeas Rule 6.

Pet. App. 170. Had Judge Suhrheinrich known what the State did, though, it is clear that he would not have reached the same conclusion. He explained that upon discovering Dr. Sultan's report and deposition, he felt obliged as a judicial officer to reverse his prior ruling. *Id.* at 8. In these cir-

cumstances, the State should not be permitted to invoke its supposed interest in reliance on that decision's "finality."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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